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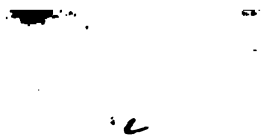
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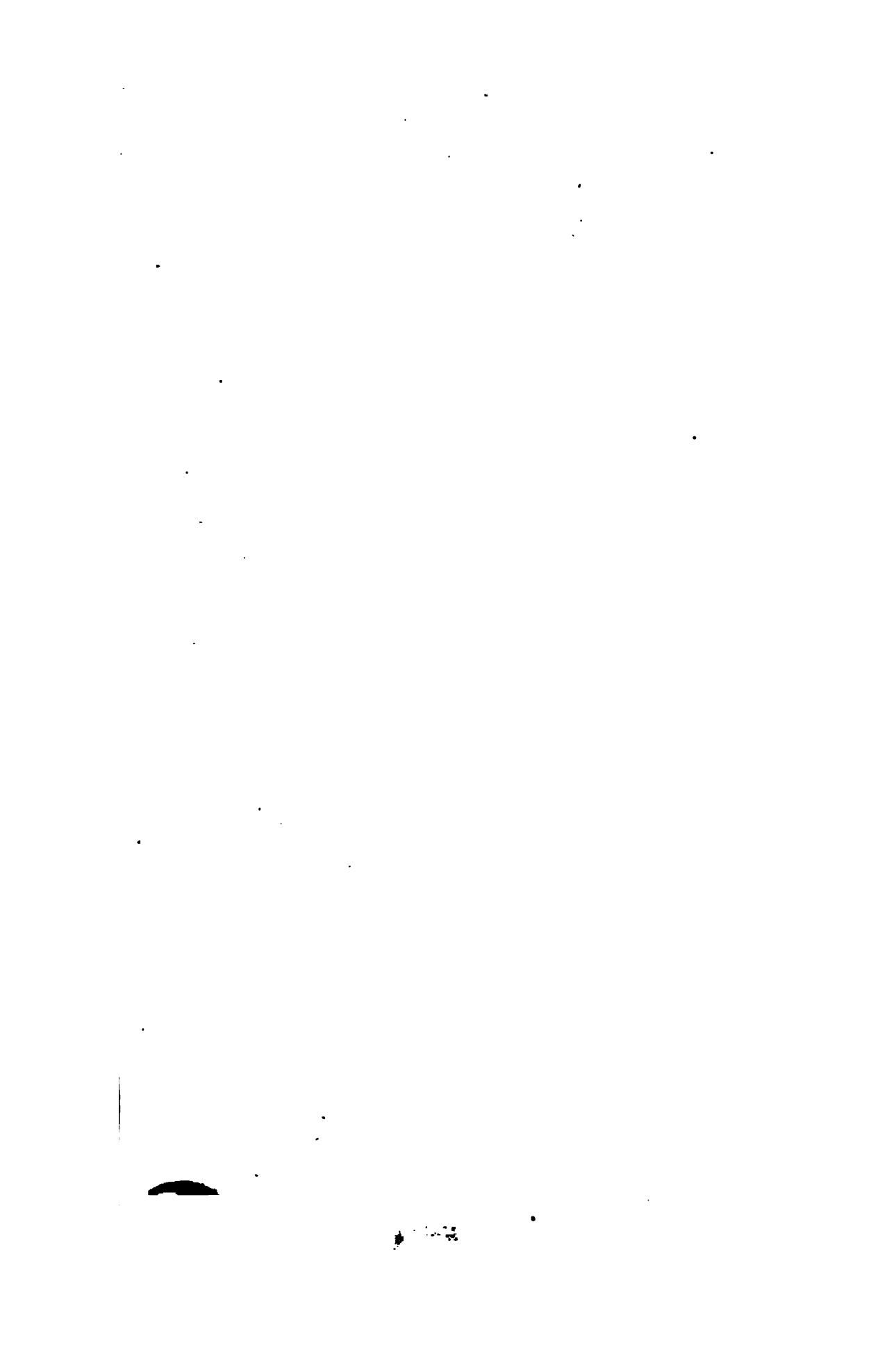
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

GEORGE MAULE and WILLIAM SELWYN, Esqrs.

OF LINCOLN'S INN, BARRISTERS AT LAW.

*Sit ergo in jure civili finis hic, legitimæ atque usitatæ in rebus causisque
civium æquabilitatis conservatio.*

CICERO.

V O L. III.

Containing the Cases of TRINITY, MICHAELMAS, and HILARY Terms,
in the 54th and 55th Years of GEORGE III. 1814, 1815.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. BUTTERWORTH AND SON, LAW-BOOKSELLERS, FLEET-STREET,
AND J. COOKE, ORMOND QUAY, DUBLIN.

1816.

J U D G E S
OF THE
COURT OF KING's BENCH,

During the Period of these REPORTS:

EDWARD Lord ELLENBOROUGH, C.J.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.
Sir HENRY DAMPIER, Knt.

ATTORNEY-GENERAL.
Sir WILLIAM GARROW.

SOLICITOR-GENERAL.
Sir SAMUEL SHEPHERD.

A

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OF THE

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IN THIS THIRD VOLUME.

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ERRATA.

- Ante, Vol. I. page 34. last line, for *Rule absolute*, read *Rule refused*.
 684. line 17. for *action*, read *act*.
 Vol. II. 383. line of references, transpose note (b) and (c).
 430. Note (a), for 1 *H. Blac.* read 2 *H. Blac.*
 477. Note (a), for *ibid.* read 5 *T.R.*
 488. Note (a), for 3 *B. & P.* read 1 *B. & P.*
 508. line 4. from the bottom, for (a), read (b).
 568. line 2. for *evidence*, read *credence*.
 Vol. III. 87. line 8. for *pleas*, read *deeds*.
 416. line 12. from the bottom, between the words *where action*, insert *the*.
 424. line 6. from the bottom, after *and* insert *if*.
 580. marginal note, line 8. from the bottom, instead of *from one of the spe-
 cified streams*, read *from the specified streams*.

C A S E S

ARGUED AND DETERMINED

1814.

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fifty-fourth Year of the Reign of GEORGE III.

BENNET and Wife *against* WATSON and Another. *Saturday, June 11th.*

TRESPASS for assault and imprisonment of the wife. Plea, Not guilty. At the trial before Thomson C. B. at the last assizes for Kent, the case was this: the defendant *Watson* was a magistrate residing at *Woolwich*, and *Newhall* (the other defendant,) a constable of that place. On the 1st of *January* 1813 a person having been apprehended on suspicion of felony, and carried before *Watson*, the plaintiff's wife was examined as a witness against the prisoner, and after her examination, was desired by *Watson* to procure her husband's recognizance for her appearance at the next quarter sessions; to which she said that she could not procure it that day, but the next day her husband or

A justice of the peace may commit a feme covert who is a material witness, upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance.

VOL. III.

B

some

CASES IN TRINITY TERM

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against
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somebody else should enter into the recognizance. Upon this promise, she was suffered to depart, but not keeping her word, on the 13th of *January* following was sent for by *Watson*, who again requested her to procure her husband or some other person to be surety for her appearance to give evidence at *Maidstone*, where the sessions were to be holden; to which she answered that *she would not go, and nobody should make her*. The matter was then explained to her fully; and an hour or more was employed in endeavouring to persuade her; but she continuing to refuse, was at last told that a warrant would be signed if she refused; and on her still refusing the warrant was signed. She was not, however, taken into custody that night; but by leave of the magistrate slept in her own house, and on the next day was conveyed by *Newhall* inside the coach to *Maidstone*, where (on the 15th) she gave evidence, and the prisoner was convicted; and without her evidence he could not have been convicted. The warrant was directed to the constable of *Woolwich*, to convey and deliver into the custody of the keeper of the gaol at *Maidstone*, and to the keeper to receive into his custody the plaintiff's wife, she having subscribed her deposition in a case of felony, &c. and being a most material and necessary witness, on behalf of the king, touching the said felony, and refusing to appear at the next general quarter sessions of the peace to give such evidence as she ought to give, and refusing to find due sureties for such her appearance, in contempt of the laws and against the peace, &c. and her safely keep until delivered by due course of law. The plaintiffs having failed in proving notice to the defendant *Watson*,
pursuant

pursuant to the statute (a), he was acquitted; but proof having been given against *Newhall* of a demand made of a copy of the warrant, and that he had not complied with it, the learned Judge allowed a verdict for 1s. damages to be found against him, giving liberty to move to enter the verdict for him, if the Court should be of opinion the action was not maintainable.

A rule nisi was accordingly obtained in the last term, and 2 *Hawk. P. C. b. 2. c. 8. s. 58.* and *c. 16. s. 2.* was cited to shew that justices may commit those who refuse to be bound, if it appear that they can give material evidence.

Curwood shewed cause, and observed that the position laid down in 2 *Hawk. c. 8. s. 58.* was only given as an opinion and not as decided law, and the writer prefaces it with "it is said;" and that, as well as several positions of the same sort in other text writers, may all be traced to the single authority of 2 *Hale P. C. 282.* It is there said "that the justices who take the information of witnesses, may, before the trial, bind over the witnesses to appear at the sessions, and in case of their refusal either to come or to be bound over, may commit them for their contempt in such refusal, and this is virtually included within their commission and by necessary consequence upon stat. 1 & 2 *P. & M. c. 13.*" But how, it may be asked, is it virtually included in their commission, since at common law the power of imprisonment can only be exercised by a court of record (b); but a justice taking examinations on a charge of felony is not a court of record. As little is it a

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 against
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(a) 24 G. 2. c. 44.

(b) See *Salk* 200. 12 *Mod.* 388.

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—
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necessary consequence upon stat. 1 & 2 *P. & M. c. 13.*; for the statute only gives the justices authority to bind by recognizance to appear at the next general gaol delivery; and therefore to hold that they may by consequence commit, would be to hold that a greater power is a consequence of a lesser. But admitting the doctrine of Lord *Hale* to be correct, still the magistrate here has exceeded his authority, because the plaintiff's wife being under an incapacity, as a married woman, to bind herself by recognizance, which is the only surety which the statute speaks of, the magistrate could not lawfully commit her for refusing to do what she was wholly incompetent to do, or if she had done, by going through the form of entering into a recognizance, would have been nugatory, but he ought to have committed only for refusing to appear.

Gurney and *Bolland*, contra, relied on the authorities above mentioned, and on the uniform practice, in the case both of infants and married women, to require a recognizance of some third person if they refuse to appear, and in case of refusal of such recognizance, to commit. And the plain inference arising from the 1 & 2 *P. & M.* is, that the justices shall have authority to compel the appearance of witnesses at the trial to give evidence against the party indicted; for which purpose the statute authorizes them to bind all such by recognizance or obligation, which must mean such recognizance or obligation as will bind, considering the situation of the witness; and if they have authority to bind they must have the means of enforcing it, by commitment in case of refusal to be bound.

Lord

LORD ELLENBOROUGH C. J. After the construction which has been put on the statute by Lord *Hale*, and the practice which has obtained since, I think we shall not be very much inclined to disturb it; and we cannot avoid doing so if we determine that this woman, who not only refused to give surety, but to appear, might not be committed in order to be forthcoming to aid the purposes of justice. For that would be to pronounce that in no case can a magistrate be warranted in committing, where there has been a refusal on the part of the witness both to find sureties and to appear. But the law intended, that the witness should be forthcoming at all events, and it is a lenient mode, which the statute provided, to permit the witness to go at large upon his own recognizance. However, that is only one mode of accomplishing the end, which is the due appearance of the witness; therefore where that mode, as well as the end, is frustrated, as far as it can be, by the witness's refusal, it seems but reasonable that the justice should be warranted in committing, which is the only means left of securing the end.

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LE BLANC J. The justice is not to commit by way of punishment, but in order that crimes may not go unpunished, he is to secure the appearance of the witness, who is to establish the delinquency, after he shall have been examined before him on oath. The statute has provided that the magistrate shall bind him by recognizance. From that time the practice has been, and so it is laid down by Lord *Hale*, that he may commit, if the witness refuse to appear or enter into a recognizance. Here the woman could not enter into her own recognizance, but that was not alleged by her

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as an excuse, but she voluntarily refused either to attend or to find security, and therefore the magistrate could do nothing less than commit. If he had done more than was necessary to secure her appearance, I agree it would have been bad; but in this instance he has done no more than was necessary for that purpose.

DAMPIER J. (a) The power of commitment is absolutely necessary to the existence of the statute of *Philip and Mary*; for unless there were such a power, every person would of course refuse to enter into a recognizance, and the magistrate could not compel him; and then if he could further avoid being served with a subpoena, the party delinquent might escape unpunished. This consideration coupled with Lord *Hale's* judgment, founded on the practice, seems to me sufficient to establish the power. The question here is respecting a person who is under a legal disability; but she not only refuses to give recognizance, but she refuses to go, doing as much as in her lay to elude the justice of the case. The magistrate, therefore, has done nothing more than was proper to secure her appearance at the sessions; upon her refusing to go, or to find any recognizance, he commits. It seems to me he was right in so doing, the practice has been so, and it follows both from the practice and the opinion of Lord *Hale* that the law is so. And therefore there must be judgment for the defendant.

Rule absolute.

(a) *Bayley J.* was absent.

1814.

POWER *against* WALKER.Monday,
June 13th.

CASE by the plaintiff, as proprietor of the copyright of the words of a certain song, against the defendant for pirating the same. Plea, Not guilty.

An assignment of copyright of a song must be in writing, in order to entitle the assignee to maintain an action on the case for pirating it.

At the trial before Lord *Ellenborough* C. J. at the *Middlesex* fittings after last term, the plaintiff, in order to establish his title, proved that one *Moore*, the author of a work intituled "A Selection of Irish Melodies," of which this song was one, transferred the copyright of the said work by verbal agreement to *R. Power*, of *Dublin*, who agreed also by parol with the plaintiff, that the plaintiff should have the exclusive right of publishing and selling the work in *England*, reserving to himself the right of selling it in *Ireland*. Whereupon it was objected for the defendant, 1st, That by stat. 8 *Ann. c. 19.* every assignment of copyright must be in writing; and, 2dly, that the right conveyed to the plaintiff by *R. Power*, (supposing it to be well conveyed) did not amount to an assignment of the copyright such as would sustain this action; but was a mere licence to the plaintiff for the publication and sale in *England*. His Lordship directed a nonsuit, being of opinion that the plaintiff had not made out his title of assignee.

Twiss now moved for a new trial, contending that copyright was a mere personal chattel, not included within the statute of frauds, and consequently capable at common law, like all other personalty, of passing by oral transfer. And he said that the stat. 8 *Ann.*

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 POWER
 against
 WALKER.

c. 19. does not make a writing necessary. That statute was passed, as its title imports, for the encouragement of learning, and is to be construed liberally; it uses the terms "transferred," "purchased," or "acquired," as applied to the passing of the property from the author to others, and speaks of his "assignee;" but none of these expressions import that the transfer or assignment must be in writing; there are assignees in law as well as in deed, which shews that an assignee may be without any assignment in writing; and it is remarkable that the statute in another branch, where it prohibits the printing, &c. by any other person than the proprietor, without his consent, expressly provides that such consent shall be in writing; therefore it is fair to presume that it would have provided for a writing in the other cases if it had so intended. And in *Miller v. Taylor* (a), though the transfer of copyright was much discussed, it was never objected that it would not pass except by writing. The inconvenience of such a construction in cases like the present is obvious, for this being a mixed production of words and music, which in general is the composition of separate authors, a separate assignment in writing of the separate copyrights upon each ballad would be necessary. And as to the objection that this is but a licence and not an assignment of the copyright, because it extends to this kingdom only, as well might it be said that an assignment for a certain number of years, was not an assignment, because it did not extend to the whole but to a part only; but if, notwithstanding, an assignment for a less number of years would be good, why may it not be good for a less extensive district?

(a) 4 Burr. 2303. S. C. 1 Black. R. 675.

LORD ELLENBOROUGH C. J. said, that the statute having required that the consent of the proprietor, in order to authorize the printing or reprinting of any book by any other person, shall be in writing, the conclusion from it seemed almost irresistible that the assignment must also be in writing; for if the licence, which is the lesser thing, must be in writing, a fortiori the assignment, which is the greater thing, must also be. And *Dampier* J. expressed himself to the same effect, and said that the assignment could only be under the statute, and therefore the plaintiff must shew that he was such an assignee as the statute required.

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against
 WALKER.
Per Curiam,

Rule refused.

The KING *against* ASKEW and Others.
Tuesday,
June 14th,

NOLAN moved for a new trial, on the behalf of *John* and *Louisa Askev*, who had been convicted, together with one *Margaret Hipwood*, of an indictment charging them with a conspiracy to indict the prosecutor for felony. He stated that *Margaret Hipwood* was not then present; that search had been made after her, but she was not to be found, having left her residence before the trial, at which time she was at large upon her own recognizance.

The presence of all the defendants convicted of an indictment for a conspiracy is necessary in order to move for a new trial on behalf of any of them.

LORD ELLENBOROUGH C. J. interposed, and referred to *Rex v. Teal* (a), where the Court determined that the presence of all the defendants convicted of an indictment for a conspiracy was necessary in order to

(a) 11 East, 307.

move

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The KING
against
ASKEW
and Others.

move for a new trial; and, he observed, the reason clearly was to prevent the most guilty from keeping out of the way, and putting forward the least guilty in order to try the result of a motion for a new trial. *Le Blanc* J. added, that when the report came before the Court in a future stage of this proceeding, if upon the reading of the report the Court saw any reason to think that justice had not been attained, it was open to them at that time, either by directing a new trial, or in any other way, to see that justice should be done.

Nolan then asked leave to file the affidavit on which he was about to move.

But Lord ELLENBOROUGH C. J. said if the Court could not grant the principal thing they could not grant the accessory.

So *Nolan* took nothing by his motion. (a)

(a) The KING v. Lord COCHRANE. (1)

AT the close of the same day Lord *Cochrane*, who had been convicted, with others, of an indictment for a conspiracy, appeared in person to move for a new trial, but none of the other defendants convicted with him attended. His lordship began by adverting to the above case, and said that if the rule as there laid down should be held to operate against his right to move for a new trial, it would be a rule of peculiar hardship as it applied to him, because he was not only in the situation of being unable to compel the attendance of the other defendants, but he had to complain that evidence was not brought forward at the trial, which was extremely material to prove his innocence.

Lord ELLENBOROUGH C. J. said that the Court must abide by the rules which they had laid down for the administration of justice, without regarding the manner in which they might be supposed to

(1) See post, *Res v. De Berenger and others*.

affect one individual more than another. Unless the other defendants were present, the rule of practice was, that the Court could not entertain a motion for a new trial; they had acted on the rule that day in the case of an obscure individual, and if they were to entertain the present motion, it might be said, and not without justice, that they had one rule for one individual and a different rule for another, or one for the rich and another for the poor.

Per Curiam,

Rule refused.

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The KING
against
Ld. COCHRANE.

'The KING against JOHN DIXON.

Tuesday,
June 14th.

INDICTMENT against the defendant, charging that for the space of six months then last past at *Chelsea* in the county of *Middlesex*, he was employed and entrusted to make and deliver for the use of the Royal Military Asylum there, the same being an institution of our Lord the King, for the bringing up certain children of non-commissioned officers, drummers, and privates of His Majesty's army, belonging to which asylum there were divers, to wit, 1200 of the said children, certain loaves of good household bread for the use and supply of the said children, at and for a certain price to be therefore paid to the defendant for the same, and that the defendant being so employed and entrusted, but being an evil disposed person and not regarding the laws, &c., with force and arms, &c. did unlawfully, falsely, fraudulently and deceitfully and for his own lucre, in the course of the said employ, and in breach of his trust and duty, deliver and cause to be delivered unto *J. H.* and *J. G.*, being respectively officers or servants belonging to the said asylum, divers,

Indictment against defendant, who was employed to make bread for the military asylum, which charged that he delivered to *J. H.* divers (ff.) 297 loaves, as for good household bread, for the use and supply of the said asylum and the children belonging thereto, whereas the said loaves were not good household bread, but contained divers noxious and unwholesome materials, not fit for the food of man, was held sufficiently certain without shewing what the noxious materials were, or that the defendant intended to injure

the children's health. Mixing alone with bread in such manner as that crude lumps were found in the bread, was holden to be indictable.

to

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to wit, 297 loaves of bread, as and for loaves of good household bread, for the use and supply of the said asylum, and the children belonging to the same, whereas in truth and in fact the said loaves of bread were not good household bread, but on the contrary contained divers noxious and unwholesome materials not fit or proper for the food of man, and the defendant well knew that the said loaves of bread were not good household bread, but that the same did contain such noxious materials. Plea, not guilty.

At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after last term, it appeared by the evidence in support of this charge, that the children at their breakfast complained of the badness of these loaves, and some of the loaves being cut and tasted, lumps of crude alum were discovered in the bread, upon which some of the loaves were returned to the defendant. There was also general evidence that alum was an unwholesome ingredient. On the part of the defendant, his foreman proved that his master had two establishments, and that he (the foreman) was the person employed in making this bread, that he used to mix certain proportions of alum after it was dissolved, with the bread, viz. 8oz. to 82 loaves, but he could not account for this alum being found in the crude state. He stated also that he had no reason to suppose his master knew of any alum being mixed with this bread, but his cross-examination threw considerable doubt upon that point. The defendant then called a medical person in order to prove that in his judgment alum mixed with bread in the proportions above stated was not an unwholesome ingredient, but the witness being a quaker, and refusing to be sworn, his evidence could
not

not be received. His lordship left it to the jury to say whether the defendant knew of the alum being mixed, and the Jury found the defendant guilty.

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Dixon.

Scarlett now moved for a new trial, in order to have the benefit of the evidence, which he was deprived of at the trial by reason of the witness being a quaker, and he tendered the affidavits of several physicians, all of which he said concurred in this, that alum mixed with bread in the proportion of 8oz. to 82 loaves, was not only innoxious but wholesome. Therefore he contended that if the defendant knew of the mixture, yet if he supposed it was mixed in such proportion as would not be pernicious, he would be discharged from this indictment, however he might be indictable in another form, as for employing an unskilful person, or that person might be indictable for his misconduct; because it is a maxim that the principal is not answerable for his agent criminally, but only civilly. He likewise moved in arrest of judgment upon two exceptions to the indictment, 1st, that the indictment avers only that the loaves contained divers noxious materials, &c., but does not shew what those materials were, so that the defendant had no notice, what he was to defend; and for this reason an indictment for obtaining money by false pretences, which did not shew what the false pretences were, was held ill in *Rex v. Mason* (a); 2dly, the indictment does not shew that he intended to injure the children's health, but only that he delivered the loaves for the use and supply of the children, not even shewing that he intended the children should eat them,

(a) 2 T. R. 581.

whereas

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against
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whereas the malus animus is of the very essence of the crime, and therefore should be shewn upon the record.

The Court refused a rule either for a new trial or in arrest of judgment; as to the first *Lord Ellenborough* C. J. said that the affidavits went no farther than to shew that alum was a material somewhat noxious, and therefore required great care on the part of those who ventured to use it, lest by their manner of using it they should cause it to become noxious. He who deals in a perilous article must be wary how he deals, otherwise, if he observe not proper caution, he will be responsible; and the statute (b) having interdicted alum in the making of bread, shews that it must be considered as a perilous article. Here the manner of using it appeared very plainly, for there were palpable lumps of the crude material in the bread. And *Bayley* J. said that if a person employed a servant to use alum, or any other ingredient, the unrestrained use of which was noxious, and did not restrain him in the use of it, such person would be answerable, if the servant used it to excess, because he did not apply the proper precaution against its misuse. As to arresting the judgment, *Bayley* J. observed upon the first ground, that it was peculiarly within the defendant's knowledge what materials he used, and it was a rule in pleading that a party may allege generally what is within the knowledge of the other party; and *Dampier* J. said, if the exception were good, the consequence would be that although death had ensued from eating the bread, the defendant could not have been indicted until it was ascertained what the particular ingredients were; and

(a) 36 G. 3. c. 22. s. 3.

the indictment pursued nearly the same form as in *Rex v. Treeve* (a). Upon the other ground Lord *Ellenborough* C. J. said it was an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act, and here it was alleged that he delivered the loaves for the use and supply of the children, which could only mean for the children to eat, for otherwise they would not be for their use and supply.

Rule refused.

(a) *Kear's P. C.* 821.

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The KING
against
DIXON.

SMITH and Another, *qui tam*, &c. against Moss. Tuesday,
June 14th.

DEBT by the plaintiffs, as farmers and collectors of the post horse duties, against the defendant, alleged to be a person letting horses to hire for the purpose of travelling post by the mile and from stage to stage, and usually letting horses to hire, and *duly licensed for that purpose*, to recover a penalty of 10*l.* under *statu. 44 G. 3. c. 98.*, and *48 G. 3. c. 98. ss. 7, 8.* for letting to hire, within six calendar months, &c., to a certain person by the stage, four horses to be used in travelling, and charging a specific sum of 84*l.* for the whole distance, and not inserting in his stamp office weekly account one quarter of the money so charged, as for the duty, &c. Plea *nil debet*. At the trial before *Wood B.* at the summer assizes at the City of

The letting to hire a hearse and four horses by a person licensed to let horses for the purpose of conveying a corpse from *T.* to *B.*, to be buried, for which the person letting charged and received a specific sum for the job, and not after the usual or any certain rate per mile, was holden not to be liable to the post-horse duty.

It seems that under a deputation from the commissioners

of stamps, authorizing *H.* and *S.*, collectors of the post-horse duties, to grant licences to persons to let post-horses, a licence by *H.* for *S.* and self is well enough.

York

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SMITH
against
MOSS.

York 1813, it appeared that the plaintiffs were the farmers of the post horse duties within a district including the Counties of *York* and City of *York*, under a lease from the commissioners of stamps for three years from the 1st of *February* 1812, and were also collectors of the said duties under a deputation from the said commissioners for the same period, by which the commissioners authorized the plaintiffs (inter alia) to grant licences to such persons as should apply for the same, within the district to let out horses to hire, &c. Under these authorities the plaintiffs issued the proper tickets, and printed and written stamp office weekly accounts to the defendant as a person licensed to let post horses; several of which accounts comprehending a period of six calendar months next before the commencement of the action were produced at the trial, which were signed and rendered by the defendant, as a person licensed to let post horses, to the plaintiffs as the farmers and collectors of the said duties in the usual way; and the defendant at the time of rendering them accounted with and paid the plaintiffs the said duties. On the part of the defendant a licence was produced, dated the 1st of *February* 1812 in this form; that *Harrison* (the other plaintiff) for *T. Smith* and self by virtue of the authority in that behalf, given by the commissioners of stamps, and in pursuance of the statutes, &c. did grant licence to *F. Moss*, (the defendant,) &c. until the 31st of *January* 1813 inclusive. The defendant let to hire a hearse and four horses for the purpose of conveying a corpse from *York* to *Brecon* in *Wales* for interment, and the same hearse and horses were employed in that service accordingly. The defendant contracted for, charged, and received
from

from the person hiring the hearse and horses, a specific sum of money for the job or service, and not after the usual or any certain rate per mile. The hearse and horses left York on the 10th of December 1812, and reached Brecon on the eighth day following, on which day the corpse was there interred, and the hearse and horses returned to York in seven days afterwards. The defendant did not enter in any stamp office weekly account rendered by him, one fourth part of the sum charged, and received by him, as and for the duty payable in respect of such hearse, and horses, nor in any manner whatever notice, in any stamp office weekly account delivered by him to the plaintiffs, the letting to hire of the said hearse and horses in the manner above stated, nor hath he paid to the plaintiffs, as such farmers and collectors, any duty whatsoever in respect of the same hearse and horses on the occasion above mentioned. A verdict was entered for the plaintiffs subject to the opinion of the Court on the following questions, first, whether the averment that the defendant was *duly licensed to let post horses* was maintained or proved by the above facts, the power to licence being given to both the plaintiffs, and executed by one for himself and the other: and secondly, whether the horses let to hire by the defendant, in the manner, and employed for the purpose aforesaid, were liable to the post horse duty. If the Court should be of opinion on both questions in favour of the plaintiffs, the verdict was to stand; but if they should be of opinion against them on either question, the verdict was to be altered and entered for the defendant.

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SMITH
vs
Metc.

1854.

SMITH
v. SWIFT
15 East.

Willeck for the plaintiffs addressed himself to last question by desire of the court, and contended the horses let to hire in the manner stated were let under the 48 G. 3. c. 98. s. 8. to a duty of one fourth the whole sum charged by the defendant, by reason that they were let to hire, *to be used in travel* which are the words of that section. He admitted that this case would not have come within the 25 G. 3. c. 51. because by that act the duty was imposed on horses drawing carriages, in respect of which duties under the management of the commissioners of excise were payable, and a hearse is not a carriage of that description; but the 44 G. 3. c. 98. sched. 1 is not so limited, but imposes the duty on horses drawn by any coach or other carriage used in travelling, which according to *Res v. Swift* (a), *Welsford v. Todd* and *Hanley v. Cubberley* (c), in opposition to *Re. Toohey* (d), is not to be understood in the popular sense of the words travelling post; and if it were, the 48 G. 3. c. 98. s. 8. has not the word "post" but only "to be used in travelling." Therefore these horses let to hire to go from *York* to *Brecon*, were in the language of the last statute hired to be used in travelling. The exception of mourning coaches in s. 6. shews that carriages of this description, which are not excepted, are within the act.

Lord ELLENBOROUGH C. J. If it was meant to impose a duty upon a letting to hire of this sort, the statute should have been more precisely and intelligibly worded.

(a) 8 East, 584. n.

(b) *Ib.* 580.

(c) 15 East, 257.

(d) 3 T. R. 69.

"To be used in travelling," one would think meant to be used by a traveller, but can that be predicated of conveying a corpse? Unless travelling is to have a limited sense given to it, it would include every species of motion or draught by means of horses; and every cart or truck employed in the removal of goods from the various wharfs of the metropolis might be said to be travelling. Upon the other question I should have been with the plaintiffs; otherwise if one of the collectors died, the power of granting licences would be at an end.

1814.

SMITH
OF
SLOAN

LE BLANC J. The 48 G. 3. c. 98. s. 6. speaks of carriages used in travelling; and can a hearse be called a carriage used in travelling? I cannot so call it, unless it can be shewn that that expression is to be extended to every waggon or carriage, without regard to whether it carries a person or not.

BAYLEY J. The 25 G. 3. c. 51. speaks in several clauses (a) of the "traveller" as the person to be charged, and who is to do certain things; all of which are inapplicable to a case like the present.

DAMPIER J. The inference arising from the exception of mourning coaches, is this, that the legislature would have excepted hearses also, which are ejusdem generis, if they had thought that they needed exception.

Judgment for the defendant.

Brougham was to have argued for the defendant.

(a) ss. 15, 16, 17.

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Where the master of a servant under a yearly hiring, 28 days before the end of the year, gave up his business, sold his stock, and paid off and discharged the servant, with all his other servants, paying them their full wages, and telling them to go where they liked, and the servant took his wages, left the house, and worked with another person, with the master's knowledge, during the 28 days: held that this was a dissolution of the contract; and it appearing upon the case stated by the sessions that they had proceeded on the ground of its being a dispensation, though the sessions did not find that as a fact, this Court quashed the order of sessions.

The King against The Inhabitants of BRAY.

UPON an appeal against an order of two Justices, removing *John Butler*, his wife, and children, from the parish of *Bray*, in the county of *Berks*, to the parish of *Great Marlow*, in the county of *Bucks*: the sessions quashed the order, subject to the opinion of this Court on the following case:

John Butler, the pauper, previous to *Michaelmas* 1806, was settled in *Great Marlow*. At *Old Michaelmas* 1806 he hired himself at yearly wages for a year to one *Hussey* of *Cookham*, as a servant in husbandry, and entered upon his service at that time. He continued to live with *Hussey* in *Cookham* until 28 days before the expiration of the year, at which time *Hussey* gave up his farming business, sold his stock by public auction, and paid off and discharged the pauper, and all the other servants in husbandry, paying them their full wages; and he also then told the pauper and the other servants that they might go where they liked. The pauper having accepted his wages, took away his cloaths and left *Hussey's* house, and worked with another person, with *Hussey's* knowledge, during the 28 days which formed the remainder of the year.

Best and *Shepherd*, in support of the order of sessions, contended, that though the sessions had not found as a fact that the master dispensed with the pauper's service for the last 28 days, yet they had impliedly drawn that conclusion, and the Court, seeing that, would either correct or confirm their opinion, without

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without requiring a more precise finding; for which they cited *Rex v. St. Mary Lambeth* (a), *Rex v. Mildenhall* (b), and *Rex v. Maidstone* (c); though in *Rex v. St. Peter Mancroft* (d) the case was sent down to be re-stated. And, in support of the conclusion drawn by the sessions, they relied on *Rex v. St. Bartholomew* (e), *Rex v. St. Andrew Holborn* (f), and *Rex v. St. Mary Lambeth* (g)

LORD ELLENBOROUGH C.J. We take it that the sessions did hold this to be a dispensation; but then a question occurs, why did they so? What is to be the limit to this doctrine of dispensation if it is to be carried thus far? It should seem as if the master might, at the end of a day, or a fraction of a day, if he has no longer occasion for his servant, send him away, and thereby dispense with the whole year's service. But is not that absurd? Where, indeed, the relation of master and servant continues, but the master foregoes the benefit of actual service for part of the time, that has been held a dispensation; but here is every thing which can be predicated of a dissolution of the contract, for the master paid off and discharged the pauper with the rest of his servants, and the pauper left the house, and engaged himself with another master during the remainder of the year. I cannot but say that I am sorry for some of the cases on this subject, which have created such an artificial system; I think that not only the decision of the sessions in this case is unrea-

(a) 3 T. R. 236.

(d) 3 T. R. 477.

(g) 3 T. R. 236.

(b) 12 East, 482.

(e) Cald. 48.

(c) 1b. 550.

(f) 2 T. R. 627.

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tants of
BRAY.

sonable, but that several of the cases on which it professes to stand are unreasonable also.

LE BLANC J. *Rex v. St. Bartholomew* was under special circumstances. Here the pauper, after quitting the service of *Hussey*, worked under a distinct engagement; and though not such an engagement as would gain him a settlement, still it was inconsistent with the continuance of his former contract.

BAYLEY J. The moment the pauper quitted the service he was to be at full liberty to contract a new relation, and he did so.

DAMPIER J. The master pays him his wages, and tells him to go whither he liked, and the pauper accepts his wages, and contracts a new relation during the time.

Order of sessions quashed.

Wakefield and *Burnal* were against the order.

Wednesday,
June 15th.

The KING against The Inhabitants of CALOW.

Grandfather,
father, and son,
and the grand-
father gave the
father a piece
of land, on

UPON appeal against an order of two Justices removing *Bartholomew Maskery*, his wife and children, from *Wirksworth* to *Calow*, both in the county which he immediately built a house, and continued in possession for 30 years, without paying any rent or acknowledgment, sometimes residing in the house with his family, and at other times letting it, and receiving the rent: held that the son, who ceased to be a part of his father's family 15 years after the building of the house, was entitled to the settlement which the father gained by residing in the house.

of

of *Derby*, the sessions confirmed the order subject to the opinion of this court upon the following case :

A *prima facie* settlement in *Calow* being proved by relief given to the pauper's father about 30 years ago, it was proved, in answer, that about the same period the grandfather of the pauper gave the pauper's father a piece of land in *Wirksworth*, upon which the father immediately built a house, and lived in it with his family for several years. He then resided in a third parish for some years, during which time he let the house and received the rent for it. Ten years ago he returned to the house, and has resided in it ever since, and never paid any rent or acknowledgment for the house or land on which it stood. The pauper was a part of his father's family at the time the house was built, and continued so for about 15 years afterwards, when he married, left his father's family and never returned. The pauper's grandfather resided in *Wirksworth*, from the time when the house was built until his death about seven years ago, within a few yards of his son, during which time he received occasional relief from *Calow*.

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against
The Inhabitants of
Calow.

Balguy and *Shuttleworth* in support of the order of sessions, admitted that the pauper's father gained a settlement in *Wirksworth* by residence in the house, but denied that such settlement was communicated to the pauper, and for this reason, because the pauper had ceased to be a part of his father's family before the father's title to the house was perfected by a 20 years' possession, and consequently before the father had a right to reside on it irremovably so as to gain a settle-

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against
The Inhabitants of
Calow.

ment for himself. At the time the pauper quitted father's family, his father had a mere naked possession unaccompanied with any pretence of title.

Lord ELLENBOROUGH C. J. It is true, that father, at the time when the son ceased to be a part of his family, had been in possession of the estate 15 years; but he was in under some title or other under which he has continued the possession for years more and up to the present time; therefore, looking at the whole we must infer a title in him at the former period. The subsequent possession reflects light back on the title under which he before held, and the Court will presume now, that his possession originated under a title, which would have prevented him from being dispossessed at the time when he quitted his family.

RAYLEY J. It cannot be said that the father was without any pretence of title, for the case states that he had a gift of the land.

DAMPIER J. The subsequent possession legalises the former possession, and shews that it was of right.

Per Curiam,

Orders quashed.

Clarke and Denman were against the order.

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DRIVER, ex dem. FRANK, *against* FRANK.Friday,
June 17th.

EJECTMENT. At the summer assizes for the county of York 1812 there was a verdict for the plaintiff, subject to the opinion of the Court upon a case reserved, which was afterwards, by permission of the Court, turned into a special verdict, and stated in substance as follows :

Margaret Frank being seised in fee of the premises in question, by her will, dated the 12th of November 1765, and duly executed and attested, after appointing and devising her capital messuage or dwelling-house, with the appurtenants, in *Pontefract*, to the use of her sister *Dame Catherine Standish* for life, upon a condition therein mentioned, with remainder to the use of her (the testatrix's) niece *Catherine*, the wife of *Bacon Frank*, of *Campsall*, in the county of York, Esq. for life, and also devising certain meadow, pasture, and arable lands to trustees for 99 years, if her said niece should so long live, upon trust to pay the rents and profits to such person as her niece should appoint, by way of pocket-money for her during her husband's life, and in augmentation of her jointure after his decease, in case she should survive, devised her said capital messuage, or dwelling-house and lands above mentioned, from and immediately after the determination of the above estates,

Devise of all testatrix's real estates to the use of *B. F.*, the husband of her niece, for life, and from and immediately after his decease, then to and to the use of the 2d, 3d, 4th, and all and every other the son and sons of the body of *B. F.* by his said wife (except the first or eldest son) severally, and successively, and in remainder one after another, and of the several heirs male of the body of every such son and sons (except the said first or eldest son); and for default of such issue, to the use of *F. S.*, youngest son of another niece of the testatrix, for life, &c. Held that the remainder to the sons of *B. F.* (who had no children at

the date of the will,) was not a contingent remainder to such son as should be the 2d son of *B. F.* at the death of *B. F.*, nor a vested remainder in the 2d or other son of *B. F.* liable to be divested by his becoming the first or eldest, by the death of his elder brother in the lifetime of *B. F.*, but a vested indefeasible remainder in the 2d or other son of *B. F.* who should be born living an elder; and therefore *B. F.* having had four sons, of whom the 2d and 3d, and 2d and 4th, were in existence at the same time, but all, except the 4th, died in the lifetime of *B. F.* without issue, held that the surviving son was entitled under the devise.

and

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and also all and singular her manors, messuages, lands, tenements, hereditaments, and real estate whatsoever, as well freehold as copyhold, from and immediately after her (the testatrix's) decease (except as therein was excepted), charged and chargeable with the several charges and payments thereafter mentioned, to the use of the said *Bacon Frank* for life, without impeachment of waste; remainder to the use of the trustees during the life of *B. Frank*, in trust to preserve contingent remainders; and from and immediately after the decease of the said *B. Frank*, then to and to the use of the 2d, 3d, 4th, and all and every other the son and sons of the body of the said *B. Frank*, begotten or to be begotten on the body of the said *Catherine*, his now wife, (EXCEPT THE FIRST OR ELDEST SON,) severally, successively, and in remainder one after another, as they and every of them should be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of every such son and sons (except the said first or eldest son) lawfully issuing, the elder of such sons and the heirs male of his body being always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing; and for default of such issue, then she devised all her said manors, &c. as well freehold as copyhold, (except as before excepted) to the use of her godson *Frank Sotheron*, (the lessor of the plaintiff,) youngest son of *W. Sotheron*, of *Darlington*, in the county of *York*, Esq. by her niece *Sarah*, his now wife, for life, without impeachment of waste; remainder to the use of the trustees during the life of *F. Sotheron*, in trust to preserve contingent remainders; and from and immediately after the decease of the said *F. Sotheron*, then to and to the use of the 1st, 2d, 3d, 4th, and all and every the son and sons of the body of the

the

the said *F. Sotheron* lawfully begotten in tail male successively, according to their seniority of age and priority of birth, the elder and his heirs male being always preferred before the younger ; with divers remainders over, the ultimate remainder being to the use of her nephew and three nieces, *Sir Frank Standish Bart.*, *Sarah* the wife of the said *W. Sotheron*, *Elizabeth* the wife of *Robt. Ramsden*, and *Catherine* the wife of the said *B. Frank*, and to their respective heirs and assigns for ever, to take both freehold and inheritance, as tenants in common, and not as joint tenants.

There was a proviso in the will that the tenant in possession, for the time being, of the estates devised, should assume and use the surname of *Frank* only, which has been accordingly done by *F. Sotheron*, now *F. Frank*, the lessor of the plaintiff. The testatrix died on the 1st of *June* 1766; Dame *Catherine Standish*, her sister, died many years ago. *B. Frank*, the tenant for life, had issue by his said wife four sons, viz. *Richard*, born the 22d of *August* 1768, died on the 26th of *February* 1769.

Bacon, born the 2d of *August* 1770, died without issue the 16th of *June* 1789.

Edward Richard, born the 5th of *May* 1777, died the 22d of *October* 1777.

Edward Frank, (*the defendant*,) born the 6th of *March* 1780, and now living.

B. Frank, the tenant for life, died in 1812, leaving the defendant, his then only son, him surviving. *Catherine*, the wife of *B. Frank*, died in his lifetime.

(a) At the time of making the said will, *B. Frank*,

(a) This part of the special verdict, to the end, was added after the first argument, in consequence of an inquiry from the Court whether *B. Frank*, the father, had, at the time of the will, considerable, and what estates.

the

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the father was in possession as tenant in tail of large freehold estates at *Campsall*, and other places in the county of *York*, of considerable annual value, and tenant in fee of other estates; and *W. Sotheron*, the father of the lessor of the plaintiff, was in possession, as tenant in fee of part, and as tenant for life with remainder to his eldest son in tail of other part, of estates of considerable annual value.

This case was twice argued at *Serjeants' Inn*; once by *Richardson* for the plaintiff, and *Holroyd* for the defendant, before *Easter* term; and again by *Park* for the plaintiff, and *Topping* for the defendant, before *Michaelmas* term 1813.

For the plaintiff it was argued that the intention of the testatrix was apparent on the face of her will, that her estate should not unite with the estate of *B. Frank*, the father, but should be kept separate and distinct; and that in order to effectuate such intent, the Court would construe the devise to the children of *B. Frank*, as it was explained by the exception, in one of two ways; 1st, either as a contingent remainder to such son of *B. F.* as should be his 2d son at the time of his death; in which case, the defendant, being at the death of *B. F.* his only son, and so not answering the description of taker designated by the will, the estate would go over to the next in remainder, viz. the lessor of the plaintiff: or, 2dly, if the remainder was not contingent, but vested in the defendant at his birth, living an elder brother, as 2d or other son of *B. F.*, then upon the death of such elder brother, the estate was divested out of the defendant, by force of the exception of the first or eldest son.

For the defendant it was denied that such an intention as contended for by the plaintiff was to be collected

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lected from the words of the will; and it was argued that the defendant, under the devise to the 2d and other sons of *B. F.*, took a vested remainder at his birth, living an elder brother; which was not divested by the event of his elder brother's death.

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The arguments, and all the principal cases upon these points, will be found fully discussed and considered by the Court in giving judgment, which they took time to consider.

There being a difference of opinion upon the Bench, the Judges on this day delivered their opinions seriatim.

DAMPIER J. after stating the special verdict, and more particularly the clause in the will relating to the devise to *B. Frank* and his children, with the remainder over, said, — The decision of this case rests upon the construction of the clause in the will of *Margaret Frank*. And the point whether the remainder over, limited by that clause to the lessor of the plaintiff, has taken effect in possession, under the circumstances which have happened, depends upon two questions, 1st, whether the estate given to the children of *Bacon Frank*, by the same clause, was a vested interest, on a person, answering the description of that clause, coming in esse, or whether it remained in contingency, till the determination of the particular estate. 2d, Whether supposing it to be vested, it is divested under the events which have happened. The lessor of the plaintiff is to shew either that it was a contingent interest, or that being vested it is divested. When *Margaret Frank* made her will, which was about eight months before her death, *Bacon Frank*, who had married one of her nieces, had no issue; *William Sotherton*, who had married

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other nephew-in-law, *Sotheron*, who has two, without regard to what may happen to his elder brother; but if *Bacon Frank* has more sons than one, I give it to his second and other sons in succession, in the same manner as, in case of there having been none, or their issue failing, I have given it to *Frank Sotheron*. Giving all the weight to the exception of the *first or eldest son* which I think it is entitled to, either in its terms or by way of inference, I do not think it can so far govern the construction of the will under consideration, as to make the interest of the second and other sons contingent till the death of the tenant for life. It has always been an object with courts of law and of equity to vest interests as soon as the words of the instrument will admit of it. Such a construction is convenient, as it facilitates provisions for families, by ascertaining the rights and property belonging to each member of it, and tends in general to an equal and fair arrangement and distribution. I will only mention some of the many cases on that head: *Woodcock v. Duke of Dorset*, 3 Bro. Ch. C. 569.; *Cholmondeley v. Meyrick*, *ibid.* 253. n.; *Willis v. Willis*, 3 Ves. 51.; *Hope v. Lord Clifden*, 6 Ves. 499.; *Edwards v. Hammond*, 3 Lev. 132. S. C. 1 N. R. 324. n.; *Bromfield v. Crouther*, 1 N. R. 313.; *Doe v. Moore*, 14 East, 601.; *Doe v. Nowell*, 1 M. & S. 327. Let me again read the words of the clause: (here the learned Judge briefly stated it.) Nothing arises from the expression "from and immediately after the death," &c. considered alone; much more effective words have been holden, in some of the cases above cited, not to prevent the vesting of estates. Here they point out the time when the party shall come into possession, and whether the devise be immediate

diate or in remainder makes no real distinction. The case of *Lomax v. Holmden*, 1 Ves. 290., shews only that the first son, at the time of the testator's death, might take under the description of first son, in the will; though a son had been born, and died, after the making of the will, and in the testator's life-time. It also shews that the same person may answer the description of "primogenitus et secundus." It seems to me that the determination in that case cannot bear upon this, in favour of the lessor of the plaintiff, as no child of *Bacon Frank* was in esse at the time of the death of the testatrix. It proves only that a second born son may take under the description of first. As it shews that he may also take under the description of second, it rather turns the other way, and it appears to overthrow the distinction above noticed between first and eldest. The case of *Doe v. Hallett*, 1. M. & S. 124., lays it down that a second son may become a first, so as to take under that description: but as the words to be begotten were there considered as equivalent to begotten, *Walter James Head* was, when the will was made, the first son of *Sir Thomas Head*, exclusive of *William Head*, on whose death the limitation to such first son was made. I will here take notice of the case of *Chadwick v. Doleman*, 2 Vern. 528., though it may perhaps apply rather to the second point, on the divesting of an estate once vested, and was cited for that purpose. It turns on an appointment and off a portion; a subject upon which, as is observed in *Lomax v. Holmden*, 1 Ves. 292., the Court of Chancery has taken larger liberties than on any other; an eldest daughter, where there has been a son and an only daughter, has been held to be a younger child, so as to be entitled to a

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provision under that description. Lord Keeper *Cowper's* decision seems to be grounded on that doctrine, and is the converse of it. The case was this, the father appointed, under a marriage settlement, a sum of money by way of portion to his second son, who afterwards became the first son, and, as such, entitled to the whole estate; whereupon the father made a new appointment among his other children. And the Lord Keeper agreed to the rule, that of voluntary deeds and appointments the first is to take place, and likewise admitted that the defendant, at the time of the appointment, was a person capable to take, and was a younger child within the power of appointing; but was of opinion it was a defeasible appointment, (as he termed it,) not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit condition, that he should not afterwards happen to become the eldest son and heir; so that he had, as it were, only a defeasible capacity in him. Lord *Cowper* himself afterwards, in *Trafford v. Ashton*, 2 *Vern.* 660., held that a *second* son took an estate, by that description, being *second* in order of birth, though the elder brother was dead before he was born. This accords with what was said in *Lomax v. Holmden*, that a person may answer both descriptions of *primogenitus et secundus*. In that case it does not appear that there was any other son or any daughter to contest the matter with *Richard Ashton's* representatives: but the description was held sufficiently certain to vest the estate in *Richard* during his mother's *life*, which makes the case bear materially on the present question. Here it appears that *Richard*,
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the first son of *B. Frank*, was born in 1768, and after his death *Bacon* was born, and lived till 1789; during which period both *Edward Richard*, and *Edward*, (the defendant,) were born: but *Edward Richard* died before the birth of the defendant. According to the case of *Trafford v. Ashton*, the estate vested successively in *Bacon* as second, *Edward Richard* as third, and *Edward* as fourth son. But putting that case aside, and granting that a *second* son, born after the death of an elder brother, would not answer that description, the fact is not so here, for two sons, *Bacon* and *Edward*, were co-existing, and were so for nine years. The consequences of holding the estate to be contingent till the death of the father, and that the person answering the description at that time should take, might be very inconvenient and injurious to the family. Suppose *B. Frank*, (the father,) had had two sons, and the eldest had died in his father's life leaving a son; he would take *B. Frank's* estate; there would be no *second* son, answering that description, when the contingency happened, to take the testatrix's estate; which would go over, leaving the second son of *B. Frank*, in order of birth, wholly unprovided for. This can hardly be supposed to have been the testatrix's intention. Again, supposing three sons, the eldest to die in *B. Frank's* life-time, leaving a family; the second son would be excluded from both estates, as his younger brother would take the testatrix's estate, as second son, when the contingency happened. Another case may be put; supposing many sons, and all, or all but the *eldest*, were to die in *B. Frank's* life-time leaving families; the estates would go over, and the families of the younger sons of *B. Frank* would not be provided for; which,

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as it seems to me, would defeat any intention the testatrix can be supposed to have had. It is possible, and perhaps probable, that these consequences were not in her contemplation: but no one can say they were not; and I cannot infer an intention pregnant with such consequences, unless it appears much more clearly and precisely than I can collect it from this will, either by expression or implication. As to the second point, I will introduce what I have to say upon it, which will be very short, by stating Lord *Mansfield's* words in *Chapman v. Brown*, 3 *Burr.* 1634.: "A court of justice may construe a will, and from what is expressed, necessarily imply an intent not particularly specified in words: but we cannot, from arbitrary conjecture, though founded on the highest degree of probability, add to a will or supply the omissions." This construction of the will requires the same intention to support it that the other does, on which I have already given my opinion; but it appears to me to labour under much greater difficulty, as it requires the supply of many more words, and indeed of a whole clause, to give it a complete effect as a conditional limitation, operating to separate the estates, whenever, by failure of persons answering the description, they may chance to be united in one person. If this cannot be done, according to Lord *Mansfield*, on a conjecture founded on the highest degree of probability, I think it cannot be done in a case, where the testatrix has not Mr. *Frank's* power to unite the estates contrary to intention, and where the intention is not defeated through the subsequent limitation under the will of the plaintiff is to take. It was not insisted upon, and I think it must fail for want of

to ground it upon. Upon the whole, I am of opinion that, upon the facts found on this special verdict, there must be judgment for the defendant.

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BAYLEY J. I am of opinion that the lessor of the plaintiff is not entitled. It has been argued on the part of the lessor of the plaintiff that the limitation in *Margaret Frank's* will to the second and other sons of *B. Frank* creates contingent remainders, which were not to vest until the death of *B. Frank*; or if not, secondly, that the estate will shift and pass on from any one who becomes *B. Frank's* eldest son, and will go to the next in remainder, as if such son and his line were extinct. And unless one of these propositions can be established the lessor of the plaintiff cannot succeed. That a limitation by way of remainder, either by deed or will, to unborn children will, in general, give a vested interest to a child as soon as any one comes in case, is a point which cannot be disputed. It has been made the basis of many modern decisions, *Doe v. Perryn*, 3 Term Rep. 484.; *Doe v. Martin*, 4 Term Rep. 39.; and *Doe v. Dorvell*, 5 Term Rep. 518.; and there are these strong reasons for the decision: first, because the law always leans to the vesting of remainders in the case of real estates, inasmuch as contingent remainders are liable to be destroyed; and, secondly, because keeping the remainder contingent until the particular estate determined would, in many instances, exclude the issue of a person intended to take in tail, by the parent's dying before the remainder became vested. These reasons are given by *Buller J.* in *Doe v. Perryn*, 3 T. R. 494.; and the former of them, viz. that the Court never construes a remainder to be contingent

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where it can be taken for vested, is mentioned by Lord *Hardwicke* in *Ives v. Legge*, in 1745, according to the note of that case in 3 *T. R.* 439. But the question here is whether the words of exception, (except the first or eldest son,) will not take the case out of the general rule, and will not prevent the estate from vesting till *B. Frank's* death, or after it has once vested will not divest it. The words "first or eldest," though in some cases synonymous, may have different meanings, the word "first" applying strictly to the first born, and the the word "eldest" applying to one who, though not first born, becomes eldest; and upon this will, I think their true construction is to explain whom the testatrix meant by the terms "second son" in the prior limitation, and to confine this exception to such son or sons as she meant the prior limitation to om it, but not to prevent the estate from vesting as soon as there should be such a second son as she meant to designate. The term "second son," if unexplained, might admit of question; if it meant second in order of nature, it would include a son who, at the time of his birth, might be an eldest and only son, and one object of this exception might be to confine the words "second son" to a child who had an elder brother living at the time. The limitation too, without the exception, would have stood to the second, third, fourth, and every other the son and sons of the bodies of *B. and Mrs. Frank*; and the latter words "to every other the son and sons" are so general, that the testatrix might have doubted whether they would not let in the son whom she had previously passed by, if there were not words expressly to exclude him; and she might have introduced the exception in question for the farther purpose of this

exclusion. To put it in a different way; if *B. Frank* had had several sons, each dying soon after its birth, so as for a series of years never to have had two sons at a time, none of these children would ever have stood in the character of a younger child, and would never have answered the description of 2d son, in the meaning in which, according to my view of this exception, it was used in this will, and therefore would never have been entitled under the limitation to the 2d son; but as soon as there were two sons in esse at a time, then there was a person who, in the narrower construction of the word, second, and in the manner in which this exception seems to me to narrow it, answered the description in this will; and then in my judgment this remainder vested. The reason, indeed; why the testatrix introduced this exception (except the first or eldest) is not stated in the will, but it was assumed in argument that it must have been to prevent an union of her estates with *B. Frank's*, and to have made out of her estates, and his, two independent families; and unless the lessor of the plaintiff can make out that that was her intention he must fail. It is singular indeed that we are to assume that the testatrix must have meant to prevent an union of her estate with *B. Frank's*, when this verdict does not find that the testatrix knew that *B. Frank* had any estate; and we must construe this will as if the testatrix was utterly ignorant whether *B. Frank* had any estate or not. It is observable too that there are no words to shift the estate from a 2d son, when he becomes an eldest, which is usual, where the object is to prevent an union of two estates, and which words, according to the case in *Burr.* 2246., seem necessary for that purpose; and the want of those words

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makes it the less certain that the preventing an union of the estates was the testatrix's object. Where a testatrix does not condescend to give a reason, it is difficult to say what her reason must have been; and if more than one can be given, it is not safe to act upon the presumption that she had only one. Suppose the testatrix to have added after this exception (except the 1st or eldest son) whom I except for this reason, because Mr. *F.* means to bring him up as a Catholic, or a Dissenter, or because he means to send him to a particular school or university, which I dislike, or to a particular tutor, of whom I disapprove, or because he intends him for the army or navy; could the construction now contended for prevail, that the limitation to the 2d and other sons was to be contingent till *B. Frank's* death, or was to shift and pass on whenever a 2d son became an eldest? Or suppose the testatrix to have given this as a reason for the exception, whom I except because I quarrelled with Mr. and Mrs. *F.* about the name their eldest child was to have, and they vowed they would give the name to which I objected, not only to the first born, but, in case that should die, that they would give it to each son that should become eldest until they should have two sons in esse at the same time, that is, until they should have, in the language of this will, a 2d son. Or suppose her to have given this reason, whom I except because I do not choose my estates to be united with those of *J. S.*, and *J. S.* has promised, upon their having a son, to settle his estates upon such son, and he has also promised, in case of the death of that son before there is a 2d, to limit it from time to time upon whoever may be their only son. In any of these cases, the argument that the exception must have been

been introduced to prevent an union of the estates of the testatrix with those of Mr. *F.* could not arise. And how can it be said with that certainty which a court of justice requires, that none of these were the reasons in this case? Evidence as to what really was the reason would have been inadmissible, and it would be singular that the Court should be deciding on the ground that the testatrix could only have had one reason, when there might be papers in her own hand-writing shewing to demonstration that she acted upon another. I cannot act upon conjecture, nor upon the most probable of several possible reasons; and though I agree the preventing an union of the estates was the most probable, yet there does not appear to me to be that certainty in this case upon which alone a Court of justice ought to act. The consequences which would result from holding this remainder contingent till *B. Frank's* death, would be no ground against holding it contingent, if I saw clearly that it was necessary so to hold in order to effectuate the manifest intent of the testatrix; but in this case I can see no manifest intent that the testatrix's estates and *B. Frank's* should not unite; and in many events which might have happened, what I can see to have been the manifest intent of the testatrix would have been defeated, were this to be considered a contingent remainder till *B. Frank's* death. It is apparent upon this will that the testatrix never meant a 3d son of *B. Frank* to take until there was a failure of male issue of the 2d, nor a 4th until there was a failure of male issue of the 2d and 3d, and so on; and that she never meant her godson *F. Sotheron* to take, until there was a failure of issue male of all the younger children of Mr. and Mrs. *Frank*: and yet the contrary would

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would have happened in many cases which might be put, if this were to be considered a contingent remainder till *B. Frank's* death. Suppose, for instance, *B. F.* to have had six younger sons, and each of them to have had male issue in his life-time, such male issue could never have taken if their fathers respectively had died before *B. F.* If the fathers of all, *i. e.* all *B. F.'s* younger sons, had died before *B. F.*, the estates upon his death would have gone over to *F. Sotheron*, to the exclusion of all the grandsons of *B. F.*; and if *B. F.'s* 2d, 3d, 4th, and 5th younger sons had died before *B. F.*, leaving the 6th surviving, the estates upon *B. F.'s* death would have gone to the 6th in tail, to the exclusion of the sons of the elder brothers. Another inconvenience from holding this a contingent remainder till *B. F.'s* death would be, that the estates could never be settled, even with *B. F.'s* concurrence, upon the marriage of any of his sons, because no secure provision could be made upon them for wife or children. Upon the whole, therefore, inasmuch as I cannot see with certainty that this exception of the first or eldest son was to prevent an union of the family estates, as this is only the most probable of several possible motives, as (if this were the motive) it is reasonable to expect there would have been express words to divest it even after *B. F.'s* death, as the construction contended for would prevent any family settlement of this estate during *B. F.'s* life, and would in many possible cases leave the issue of the 2d, 3d, 4th, or other succeeding sons of *B. F.* unprovided for, and carry on the estate to persons who were more distant objects of the testatrix's consideration, and as the holding that this remainder vested in *B. F.'s* 2d son as soon as he had two sons together in esse, will satisfy every

every word in the will, and, as far as I can be certain, every motive of the testatrix, and as it falls in with the axiom that no remainder is to be deemed contingent which can be deemed vested, I am of opinion that this remainder vested in the defendant *Edward Frank* upon his birth, and that it did not become divested upon his becoming his father's only son.

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LE BLANC J. The special verdict has already been stated, and as upon the fullest consideration I cannot bring my mind to any other conclusion than that which agrees with my two Brothers, I shall not repeat the statement or the arguments which they have used. Nevertheless it is proper that I should briefly state the facts and reasons on which I have brought my mind to the same conclusion with them. The questions arising on this special verdict are, first, What is the intention of the testatrix, as it is to be collected from the words of her will? and, secondly, Whether she has used words which in legal construction can carry such intent into effect? The material facts and the state of her family may be given in a few words. At the time of making her will, and at the time of her death, she had a niece, the wife of *B. Frank*, who had not at that time any issue born; and another niece, the wife of *W. Sotheron*, who had more sons than one, the youngest of whom was *F. Sotheron* her godson. *B. Frank* was at that time tenant in tail in possession of large freehold estates, and tenant in fee of other estates; and *W. Sotheron*, the father, was tenant in fee in possession of, part, and tenant for life, with remainder to his eldest son in tail, of other part, of estates of considerable value. In this situation of things the testatrix makes her will, by which,

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which, after giving her mansion-house at Pontefract to her sister, Lady *Standish*, for life, with remainder to her niece Mrs. *B. Frank* for life, and also giving certain lands to trustees, on trust, to pay the rent to her said niece Mrs. *B. Frank* for her life, by way of pocket-money during her husband's life, and in augmentation of her jointure after his death, she gives the remainder in the said mansion-house and lands, and also all other her real real estates whatsoever, to her niece's husband, *B. Frank*, for life, remainder to trustees to preserve contingent remainders, and from and immediately after the decease of the said *B. Frank*, then (and these are the words on which the doubt arises) to and to the use of the 2d, 3d, 4th, and all and every other the son and sons of the body of the said *B. Frank*, begotten on his now wife, (except the first or eldest son,) severally, successively, and in remainder, one after another, and of the several heirs male of the body of every such son and sons, (except the said first or eldest son,) and for default of such issue, unto and to the use and behoof of her godson *F. Sotheron*, youngest son of *W. Sotheron*, for his life, remainder to trustees, &c. remainder to and to the use of the 1st, 2d, 3d, 4th, and all and every other son and sons of the body of the said *F. Sotheron*, in tail male, with an ultimate remainder to her nephew and three nieces in fee, as tenants in common. Considerable reliance was had in argument on this exception, just adverted to, of the first or eldest son, here twice introduced, as manifesting an anxiety on the part of the testatrix to exclude a younger son becoming a 1st or eldest son. I confess it strikes my mind as not carrying the exclusion farther than the first expression limiting it to the 2d, 3d, and 4th

4th son, and as introduced for no other purpose than to exclude a conclusion that under the terms "other son and sons" might be included a 1st or eldest son, if this exception were not added. From the other facts of the case it appears that during the life of *B. Frank* there were in existence at the same time, a 1st or eldest son, and also a 2d son, answering the description in the testatrix's will of the 2d or other son, except the 1st or eldest son; but all the sons but one having died in the life-time of *B. Frank*, the tenant for life, there was at his death only one son living. At that period, therefore, there was not any person answering the description of a 2d or other son, except the 1st or eldest son. And that gives rise to the question. For the plaintiff it is contended in argument upon these facts, and on the words of this will, that the intent of the testatrix is clear that her estate should never be united with the estate of *B. Frank*, but should go to make a provision for a second family in the younger sons of *B. Frank's* family, and in default of such, in a younger son of her niece *Mrs. Sotheron*. And to this effect it was contended that the remainder limited to the 2d son of *B. Frank*, after the estate for life given to *B. Frank*, is contingent until after the death of *B. Frank*, and then, and not before, is to vest in interest and possession in the person who shall then be his 2d son; and if there shall not then be a 2d son, or other son except an eldest, of *B. Frank*, shall go over to *F. Sotheron*; or that on a 2d son of *B. Frank* coming in esse in the life-time of *B. Frank*, the estate shall presently vest in interest in such 2d son, subject, however, to be divested in case that 2d son should become an elder son, by the death of his elder brother in the life-time of *B. Frank* the father. It does not appear to me that the will itself,

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from which the intention of the testatrix is to be collected, does sufficiently manifest the intent contended for to the extent to which it is contended, namely, that her estate should never be united with the estate of *B. Frank*, or that it should remain in contingency, who should take her estate in interest, till after the death of *B. Frank*. I find no words in the will limiting the period of her estate vesting in interest to the death of *B. Frank*, or intimating a design of keeping the estates separate, except so far as she describes the person who is to take. The manner in which the estate is limited to *F. Sotheron*, in default of a 2d and other sons of *B. Frank* and their issue, seems to shew the contrary; for she limits it to him, by name, for life, and to his first and other sons in tail male; so that if by the death of his elder brothers he had become the 1st or elder son of his father *W. Sotheron*, and had as such succeeded to his father's estates, he would still have been entitled to the remainder limited to him by the will of the testatrix. And there seems no good reason to suppose that her intention was different with respect to the family of one niece, from what it was with respect to the other; or that she meant to guard against the union of the *Frank* estate with her estate, more strictly, than against the union of the *Sotheron* estate with her estate: in both families she selects the younger children as the objects of her bounty, and prefers the younger branches of the family of her niece *Mrs. B. Frank*, to the younger branch of the family of her niece *Mrs. Sotheron*. I therefore consider the intent of the testatrix to be to limit the remainder of her estate after *B. Frank's* death to his 2d and other sons, he having then no sons born, in the same manner as she did with respect to the younger

younger son of *W. Sotheron*, who was then born, and as she would have done to such 2d son by name, if *B. Frank* at the time she made her will had then had two or more sons in being, viz. to *Edward* the second son of *B. Frank*; in which case such 2d son *Edward* would have taken a vested remainder subject to the life of his father. So here, I think that on the birth of a person answering the description of 2d son of *B. Frank*, the remainder vested in him, in the same manner as it would have done if such son had been born at the time of making her will, and had been described as such by name. The objection made to such construction is, that it defeats her general intention, supposing such general intention to be, to prevent the possibility of the two estates uniting in the same person; because by the death of the 1st or eldest son without issue, the 2d son will become the eldest son, and as such entitled to the entailed estate of his father, and possibly to the unentailed estate also. To this I answer, that instead of the eldest son dying in the life-time of his father without issue, he may die leaving issue; in which case the entailed estate of the father, certainly, and possibly the unsettled estate also, will go to such issue; and the 2d son will become a 1st or eldest son without the eldest son's estate; and the estate of the testatrix, expressly intended for him as a 2d son, will go over to a younger son or to another family. Again, instead of the eldest son dying, the 2d son may die leaving issue; in which case the estate intended as a provision for a 2d son's family, will go away from that family to a 3d son, or to another family. This argument may be pursued to the extent of a 3d, 4th, 5th, and any number of sons, dying in the life of the father, leaving

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ing issue, and none of their issue being capable, by this construction, of enjoying the estate evidently designed for them by the testatrix. And we must put the same construction on this will, in the events which have happened, as we should do if the situation of the family had been as I have before supposed, that is, if instead of *B. Frank's* leaving only one son, he had had several younger sons, and those sons had died in the life-time of *B. F.* leaving issue. In that case it appears to me that it would be a very forced inference to make, that the estate should, notwithstanding, go over to the family of *Mrs. Sotheron*. These necessary results of construing the will to give a contingent interest to the 2d and other sons, or in other words, to such person as shall be the 2d son at the death of the father, the tenant for life, operate forcibly on my mind against inferring such intention from the words of the will, and I cannot find such intention plainly expressed: if it had been plainly expressed, the intention must have prevailed in defiance of such consequences. The principles on which courts of law proceed, are in favour of estates vesting, and the authorities in support of those principles have been already adverted to, so that I shall not repeat them. It never could have been the intention of the testatrix to prevent a 2d or younger son of *B. Frank* from marrying in the life-time of his father, by disabling him to transmit her estate to his children at all events. Such are the arguments against construing the intention of the testatrix to have been, that there should never be an union of her estate with the estate of *B. Frank*. But supposing we could be satisfied that such was the intention of the testatrix, to keep the two estates asparate, and that they should never be united in the same son of *B. Frank*, of which I cannot

satisfy myself, still I can find no words in this will sufficient to carry such intent into effect. For whatever the intent be, if there are not words in the will to warrant it, either express or implied, it cannot have effect. Lord *Mansfield* says in *Fen v. Lowndes*, 2246. "The testator meant to make a new family in the then 2d son, or whoever should afterwards become the 2d son of his daughter by her then husband. Though this was manifestly his intention, I was extremely afraid there were not words enow to warrant us to put this construction upon it. But I think there are words sufficient to justify a construction agreeable to the intention of the testator." So here, whatever we may think was Mrs. *Frank's* intention, I cannot find any thing in the will to authorize me in reading the devise to such person as shall be the 2d son of *B. Frank* at the death of his father, so as to make it contingent. Again, I can find no words to warrant a divesting of the estate, once vested, in the event of a 2d or younger son becoming an eldest son, such as were the words of the will in the case of *Fen v. Lowndes*, and such words I conceive we cannot supply. It therefore appears to me that the intent is not sufficiently plain to limit the description of 2d and other sons to such person as shall answer such description at the death of the father, so as to make it contingent; nor to divest the remainder, once vested, in the event of the person in whom it is vested becoming a first or eldest son. For these reasons I think the judgment should be for the defendant.

Lord ELLENBOROUGH C. J. I have to regret that the view I have taken of the subject now under consideration

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deration leads me to form an opinion differing, so materially as it does, from that which has been delivered by the rest of my Brothers. The first question for consideration on this special verdict, appears to me to be, what is the intention of the testatrix, as it is to be collected on the face, and from the language of the will. And, supposing such intention to be clear and manifest, then, secondly, are there to be found in the will words capable of carrying that intention into legal effect. The first is the principal question for our consideration; for, supposing the intention upon the face of the will to be clear, it is difficult to say what words, by which such intention is clearly expressed, or from which it is manifestly and with certainty to be implied, are not also capable of giving effect to it. When I speak of certainty, I must be understood to speak of moral certainty, the only certainty which relates to this subject; and hardly any certainty, upon any moral subject, can be predicated, which does not admit some degree of mere possibility to the contrary. The testatrix, *Margaret Frank*, appears by the will to have been the aunt of two married ladies, *Mrs. Bacon Frank*, and *Mrs. Sotheron*. *Mrs. B. Frank* had no child born at the time of making this will. *Mrs. Sotheron* had at least two, inasmuch as the testatrix describes her godson, *Frank Sotheron*, the lessor of the plaintiff, as the youngest son of *W. Sotheron*, the husband of her niece *Mrs. Sotheron*. After an appointment and devise of her capital messuage, in which she lived, to her sister *Dame Standish* for her life, and after her death a similar appointment of that messuage, and of the rents and profits of certain meadow, pasture, and arable ground to *Mrs. B. Frank* as pocket money during her husband's life, she devises the
bulk

bulk of her estate to *B. Frank*, her niece's husband, for life, and from and immediately after his decease, then to and to the use of the 2d, 3d, 4th, and all and every other the son and sons of the body of the said *B. Frank*, begotten or to be begotten on the body of her said niece *Catherine*, his then wife, except the first or eldest son, severally, successively, and in remainder, one after another, and the several and respective heirs male of the body, and bodies, of every such son and sons, except the first or eldest son, lawfully issuing; and for default of such issue, then unto and to the use and behoof of her godson *F. Sotheron*, youngest son of *W. Sotheron*, and from and immediately after his decease, to the use of the 1st, 2d, 3d, 4th, and all and every other son and sons of the body of the said *F. Sotheron*; with divers limitations over. There is a general proviso in the will, that the tenant in possession, for the time being, of the estates devised, should assume and use the surname of *Frank* only. The favourite object of the testatrix, *Mrs. Frank*, as it is to be collected from her will, seems to have been, to set up an *heres factus*, or representative of her own, of the name of *Frank* only, who should be taken, in the first instance, out of the family of her niece *Mrs. B. Frank*; but she seems, by an industrious exclusion of her niece's eldest son by her husband *B. Frank*, at the same time to labour to prevent the union of the estates of *B. Frank's* family with those which she devised by her will; and with a like purpose of separation (as it should seem) in respect to the *Sotheron* estates, limits the remainder of her estates to the present lessor of the plaintiff, then *F. Sotheron*, her godson, described in the will as the youngest son of her niece *Mrs. Sotheron*; thus providing, as far as it occurred to her to be practicable, against the union of her

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estates with that of the family of the *Sotherons*, at the very time when she was planning the erection and maintenance of a distinct and substantive stock of her own, by the surname of *Frank*, in the *Sotheron* line, if from the failure of a 2d and other sons of *B. Frank*, it should become impossible to attain that object in his, *B. Frank's*, family. She has not indeed declared this to have been her intention and purpose in so many words, and by an express declaration on the subject, but if the dispositions she has made are referable to no other intelligible, or almost possibly assignable purpose, she has, in effect and impliedly, so declared. And indeed, for what other reason can she be understood to have excluded an unborn eldest son, and the issue of such unborn eldest son, by a laboured repetition of words of exclusion in both instances, and this in favour of an also unborn 2d, 3d, 4th, and other son and sons of such parent, and the issue of such unborn 2d, 3d, 4th, and every other son and sons? She could not, in the case of unborn children, possibly be governed by any motives of personal favour, or dislike, in making this arrangement. But it may be said, how does it appear that there was, to her knowledge, any property in the families of *B. Frank* and *Mr. Sotheron* descendible to, or in any manner settled upon, the eldest son of those respective families, and with a reference to which, the scheme of devising, in exclusion of such eldest, may be supposed to have been formed? It is found as a fact, that at the time of making the will of the testatrix *Margaret Frank*, *B. Frank* was in possession, as tenant in tail of large freehold estates at *Campsall* and other places in the county of *York*, of considerable annual value, and tenant in fee of other estates; and that at the time of her making her will

vill *W. Sotheron*, the father of the lessor of the plaintiff, was in possession as tenant in fee of part, and tenant for life, with remainder to his eldest son in tail, of other part, of estates of considerable annual value. As far as the estates of *B. Frank* and *Mr. Sotheron* (the husbands of testatrix's nieces) were respectively entailed on an eldest son, they suggest a reason for the plan of settlement in exclusion of the eldest, which she has adopted. And as to the estates which belonged to each of them in fee, she might reasonably contemplate the usual preference, which obtains in considerable families, in favour of eldest sons, in respect to landed estates, as likely to operate in the disposition of these estates also, as far as the demands of provision for younger children might allow the respective fathers so to dispose of them. Whether she actually knew the state of their respective landed property to be as above stated, or she did not, she still may be presumed to have had sufficient general reason for believing that the eldest son, in each of these families, would take the largest share of the family estate in land; and, indeed, her purposed exclusion of the eldest, in both instances, is not reconcileable to reason on any other supposition. In the case of *Fen L. Lowndes v. Lowndes*, 4 Burr. 2247., where the testator *Layton*, the maternal grandfather, devised to his daughter's 2d son, in exclusion of the eldest, as here, it did not appear on the face of the will that the eldest had any family estate of his own, or derived to him from an ancestor, yet it was argued throughout that "his view was, that his own estate should never be confounded with that of his son-in-law *W. Lowndes*." Lord *Mansfield* says, "he meant to make a new family in the then 2d son, or whoever should afterwards

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become a 2d son; this was manifestly his intention:" and he repeats several times in the course of that judgment that his intention to this effect was plain. By the phrase of making a new family, he must have meant the constituting a new fund of provision, to be enjoyed in succession by a new and distinct class of persons from the heirs of the family; the expression, a new family, imports that there existed another family fund descendible in a different course. This was, in that case, inferred from the obvious import and effect of the will, which constituted a new class of takers of the devised property from those who, in the ordinary course of law, would have taken the family property. There could be no confusion of estates (the mischief which was meant to be avoided, as said,) in that case, if there had existed only the one estate, which the testator was then immediately devising; and why should he have excluded the eldest from that, unless it were on account of his having another substantive provision of his own? This was, however, inferred only, and assumed in that case, but not expressly stated as a fact on the face of the will, any more than it is in the present instance. Assuming the intention of the testatrix upon this subject to be clear, and such as I have supposed it to be, I do not see any particular difficulty in point of law, which stands in the way of its being carried into effect. It may be so carried into effect, first, by considering the remainder "from and immediately after the death of *B. Frank* to the 2d, 3d, 4th, and all and every other the son and sons of the body of the said *B. Frank*," as contingent, and in abeyance during the whole of the life of *B. Frank*, and as vesting, upon his death, in the person who should then
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answer the description of 2d or other son, (such other being other than the son who should be eldest at the death of *B. Frank*,) and if it vests eo instanti that the preceding particular estate determines, (*i. e.* *B. Frank's* estate for life,) as it does, it is sufficient to satisfy all the necessary purposes and rules of law on the subject. Nor supposing that the remainder should be considered as having vested in the first instance in *Edward Richard Frank*, who first answered the description of 2d son, do I see any reason why it should not afterwards, on his death without issue, be held to become in abeyance till another 2d son should be born, (which happened by the birth of the defendant in 1780,) and why upon his becoming the eldest son of *B. Frank*, (as he did in 1789,) it should not be divested out of him, in furtherance of the excluding provision in respect to the eldest son, and become once more in abeyance, and so remain during his father's life; and then, upon his father's death, (by which the possibility of there being any 2d son was determined,) vest in the remainder-man *F. Frank*, the present lessor of the plaintiff. In either of these modes, but particularly in the first of them, that of the remainder being in abeyance during the whole of the life of *B. Frank*, the tenant for life, I think that the intention of the testatrix, as displayed in her will, may be carried into effect without violating any rule of law. It certainly is a possible mischief, which might flow from a will thus framed and construed, that *B. Frank* might have several sons born, and dying, each of them leaving sons, in the lifetime of *B. Frank* the tenant for life; all of which grandchildren of *B. Frank* might be excluded, if the remainder to the 2d, 3d, 4th, and all and every

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oher the sons, &c. should not be deemed a vested one. But we are not warranted in making another will for the testatrix than that which she has actually made for herself, because inconveniences, which she did not foresee or provide against, might in another state of events have resulted from the will which she has made. And this we do indirectly, but in point of effect completely, if we adopt such a construction as excludes inconveniences which the testatrix did not contemplate, and sacrifice objects which she did : it matters little whether we make a new will for a testator, or make the old one speak a sense foreign to the actual meaning, which of itself it naturally and evidently expresses. It is possible that if these inconveniences had been presented to the mind of this testatrix, at the time when her will was made, she might have obviated them by other competent provisions ; but she has not done so. If, however, the very case which has happened had been presented to her mind, it may fairly be presumed that she would have retained her will in its present form, in furtherance of her ruling purpose of forming another family, and of excluding the eldest son, upon whom the family property of *Frank* or *Sotherton* might, as such eldest, in all probability devolve. I am well aware of certain cases in which the most direct and unequivocal words which could be used, have been in point of construction denied their effect in favour of a supposed general intent. I am not desirous of seeing the number of these anomalous cases farther increased ; but here I find no general intent standing in the way of the construction contended for on the part of the lessor of the plaintiff, but the contrary. The struggle in this case is not between conflicting intents appearing on the face of the

same will, nor between an intent and a rule of law at variance with it, but between an intent apparent and the possible inconveniences which might have arisen, by giving effect to it, in other events and circumstances than those which have actually happened. As far as it may be a question whether the giving effect to this intent is contrary to any rule of law, the case of *Chadwick v. Doleman*, 2 Vern. 528. before Lord Chancellor Cowper, which has been cited in the argument, is strongly to the contrary, and supports the principle of divesting an interest, upon a tacit or implied condition that a 2d or younger son, in whom the interest had in that character, and by that description vested, should not afterwards become the eldest son and heir; the 2d, or younger son, being held to have only a defeasible capacity of taking under the appointment in that character, and which capacity, (in the event which had happened, of his becoming the eldest son and heir,) was held to be thereby defeated. The intention and object of the appointment, as collected upon the face of the settlement, by which the power was created, was held sufficient to render the appointment, although executed without power of revocation, conditional in that case; and although the interest had been vested in that case for a period of six years in the appointee, as 2d son. It was contended there, indeed, that an interest once vested was not to be divested without an express condition or proviso for that purpose. It was however held otherwise by Lord Cowper, who pronounced "that it was a defeasible appointment, not upon the words of the appointment, but from the character of the person, the appointee;" and a subsequent appointment in favour of those

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those who were the younger children, after the first appointee had become the eldest, and in exclusion of such eldest, from the fund upon which the appointment operated, was in consequence sustained by him. Why the intention, if capable of being clearly made out, is not to have the like effect in the case of a will, I am at a loss upon any principles of reason to discover. The case of *Trafford v. Ashton*, 2 Vern. 660. before Lord Cowper, has been relied upon on the part of the defendant, as affording a different rule of construction in his (the defendant's) favour, in the case of a will. There Mr. Vavasor, the testator, having an only daughter, and having articulated with Sir Ralph Ashton, who was to make a settlement, to pay her 3000*l.* portion, afterwards makes his will, and thereby devises all his estate to trustees, in trust that his daughter might receive the profits for her life, remainder to the second son of her body to be begotten, in tail male, and so to every younger son. In default of such issue male to her eldest daughter, and to the first son of her body, taking on him the name and arms of Vavasor, and adds, "that he did not by his will devise the estate to the eldest son, because he expected his daughter would marry so prudently, as that the eldest son would be provided for." It fell out that Edmund, the first son of Lady Ashton, died in 12 months after his birth. Richard the 2d son lived till 18, and died without issue, and was not born until after the death of Edmund. The question, upon this part of the case, was whether Richard, not being born till after the death of Edmund, was a second son within the intent of the will. Lord Chancellor. "Richard was a 2d son, and must take, although not according to the testator's design; but as the will is worded, not to

to be excluded; the 2d son is the 2d in order of birth." Afterwards Lord Chancellor says, "it was a condition subsequent to defeat the estate and not precedent"—and "the negative words in Mr. *Vavasor's* will, that he had not provided for his eldest son, &c. not sufficient to exclude *Richard*, who was the 2d son by birth, though afterwards he became the eldest." The only part of this judgment of Lord Chancellor *Cowper*, with which I incline to differ, is where he says that *Richard* must take, although not according to the testator's design, but as the will is worded not to be excluded. It seems to me that, under the circumstances which had happened, the testator's design, as collected on the face of the will, was that the 2d in order of birth, even if he should become the eldest, should take. The only reason that he did not by his will devise the estate to the eldest son, was (as stated in the will) because he expected that his daughter would marry so prudently, as that the eldest son would be provided for. Here is no limitation over to the children of another house and family, in exclusion of him who might bear the character of eldest, as in the case now in judgment before the Court; but a preference given to the 2d over the first, for one only specified reason, and which ceased to apply when the characters of eldest and 2d sons were united, (as in *Richard Ashton's* instance they were,) in the same person. I should rather have said, in that case, that he answered the description of 2d son as 2d born, according to the letter of the will, and that his other character of eldest, which he afterwards acquired, was not adverse to the intention of the testator, so as to prevent the interest which the testator had expressly given him by the denomination of 2d son, from vesting in him. The only reason,

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reason, why the testator did not at once devise the remainder to the eldest, as he declares in his will, was his supposition that the eldest would not want it, and that the 2d son might. The ground of preference of course ceased upon the reason and object of it. When there was strictly no 2d, the then only child might take, according to the interest, under either description; and there was of course no reason why he should lose what was given him, under his original description of 2d, and which would have been given to him as eldest, if no 2d had been then contemplated as likely to exist, and to be unprovided for. The construction, therefore, which was adopted by Lord Chancellor *Cowper* in this case, satisfied at once the letter, and advanced instead of violating the spirit and true meaning of the will. It is hardly necessary to refer to authorities to prove that the words in this will, 1st or eldest, are not to be taken strictly as descriptive only of a primogenitus; but if that term had even been used here, which it is not, primogenitus then alive would be sufficient to satisfy that description, according to Lord *Hardwicke*, who enters into a full discussion of that subject in the case of *Lomas v. Holmden*, 1 *Ves.* 290. with reference particularly to the case of the duchy of *Cornwall*, where it was held that *Henry*, the 1st born son of King *James*, being dead, *Charles* 1. (the 2d born) might take that duchy as primogenitus. It is unnecessary to add, that Lord *Ellesmere*, in commenting upon the mistakes of Lord *Coke* in that case, (which were, as Lord *Ellesmere* says, mistakes both of fact and law,) states him to have split upon a rock, in restraining it to primogenitus, and not to the 1st pro tempore, voluntarily, without any occasion, and without the concurrence of any Judge. I will not go further

further into this case of *Lomax v. Holmden*, or the authorities therein cited of *Fitz. Nat. Brev.* 188., on the writ de auxilio ad filium militem faciendum. It is sufficient to say that they fully establish that the word 1st born is synonymous with, and means eldest, and that eldest means the 1st son, capable of taking, under that denomination, at the time to which the will refers; which, here, is at the time of the death of *B. Frank* the tenant for life. The inconveniences, which are likely to result from any particular interpretation of a testator's meaning, are powerful arguments, in point of construction, that such could not have been the intention of the testator; but supposing it once to be clearly ascertained that the testator did so intend, the will must be taken, as it stands, with all imperfections and mischiefs which are interwoven in the frame of it. Arguments of the sort I have alluded to rather appear to prove that the testator ought not, under the circumstances, so to have intended, than that he actually did not so intend. The question therefore appears to me, at last, to resolve itself into this; is the intention clear, on the face of the will, that *Mrs. Margaret Frank* entertained the purpose of erecting a new family of her own, and in furtherance of such purpose meant to exclude the eldest son of *B. Frank*, in favour not only of a younger son of the same father, but also in favour of the remainder-man *F. Sotheron*, her godson, the youngest son of *W. Sotheron*, specially named in the will? And I think the intention of the testatrix, on this head, is clear, and that it is capable of being carried into effect consistently with the rules of law; and if it may be so, it follows as a consequence of my opinion, that we ought to give such judgment as will effectuate that intention; which, as
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appears to me, would be done, by giving judgment on this special verdict for the lessor of the plaintiff. But as the rest of my brethren are of a different opinion, judgment must be given, according to their opinion, for the defendant.

Saturday,
June 18th.

The KING against PIERCE.

A justice before whom a deserter is brought and committed to the county gaol, may, if the deserter is unable to bear the charges himself, direct the expences of conveying him thither to be paid, by the treasurer of the county, to the constable of the parish who found and apprehended him in the parish, and conveyed him to the gaol.

PIERCE was indicted at the sessions for the city and county of *Exeter*, for refusing to pay a sum of money directed, by warrant of one justice for the county of *Devon*, to be paid by him, as treasurer of the said county, to the constable of the parish of *Marlborough* in the said county, for the expences of conveying a deserter to the county gaol. The indictment charged that on the 26th of June 1813, one *W. Hayman*, who was reasonably suspected to be a deserter from his majesty's service, &c. was found in the said parish, and was apprehended and brought by *T. J.*, the constable of the said parish where he was so found, before *A. H.*, a justice of the peace for the county of *Devon*, living near to the place where the said *Hayman* was so found and apprehended, and the said justice did then and there examine him, and upon his examination, by his confession, it appeared to and was found by the said justice, that the said *Hayman* was a listed soldier, and ought to be with the company to which he belonged, and thereupon the justice did forthwith by his warrant cause the said *Hayman* to be conveyed and committed to the gaol of the said county of *Devon*, and the said *Hayman* was conveyed by the said constable to the gaol of the said county, according to the form of the stat. &c. And the said *Hayman* was a person

a person not having goods or money within the county, where he was so taken, sufficient to bear the charges of himself and the said constable who so conveyed him to the gaol, but such expences were paid by the constable; and afterwards, to wit, on the 30th of *June*, on application made by him to the said justice, the said justice did upon oath examine into and ascertain the reasonable expences to be allowed to the constable in that behalf, and did ascertain and assess the same, at the sum of 4*l.* 6*s.* 4*d.*; and so the indictment went on to allege that the justice did, by warrant under his hand and seal, directed to the defendant, who was then treasurer, order him to pay to the constable the said sum, and that the warrant was delivered to the defendant, at the precinct of *Bradninch*, in the said city of *Exeter* and county of the same city, and the defendant was then and there requested, and refused to pay the same, against the form of the stat. &c. And this indictment being removed by certiorari into the King's Bench, there was a demurrer and joinder. And the question made upon this demurrer was, whether by the statutes the justice had authority to direct the treasurer of the county to pay these expences.

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Gifford in support of the demurrer denied that he had, and referred to stat. 3 *Jac.* 1. c. 10. which he said was the first and the material statute on this subject, but which he contended did not apply to the case of a deserter. It is entitled "An act for rating and levying the charges for conveying malefactors and offenders to the gaol," and the preamble recites that the subjects are charged and burthened in conveying *felons, and other malefactors and offenders* against his majesty's laws, to
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the gaol, *punishable by imprisonment there*, the said felons, &c. having goods of their own to defray the charges themselves; and then the statute enacts, “that every person and persons that shall be committed to the county gaol, by any justice, for any offence or misdemeanor, having ability, shall bear their own charges for so conveying them, to be levied, upon their refusal, on their goods and chattels; and by s. 2. if they have none, then the parish where the said person or persons shall be apprehended shall bear such charges,” &c. Here, it may be said, the enactment is general as to the description of offenders; it says, “every person or persons;” but that must be construed with reference to the preamble, and it is clear what sort of offenders the preamble meant, for it speaks of their being punishable by imprisonment in the gaol, and of the charges of conveying them thither being “to the discouragement of the subjects in prosecuting the said malefactors and offenders.” Therefore the general words, “every person or persons,” in the enactment, as restrained by the preamble, shall be intended of such persons only as are committed for trial upon the prosecution of the subject in the ordinary course of criminal proceeding. Admitting that desertion, heretofore, being in contempt of the statutes for the military array of the kingdom (a), might have been punishable in the common law courts, though there is not any instance on record of its having been so punished, up to the time of the statute in question, yet it is clear that since the mutiny act has provided for its punishment by means unknown to the common law, the punishment at common law, if it ever existed, has now ceased; therefore, in any view of the

(a) 13 Ed. 1. st. 2. c. 6. 4 & 5 P. & M. c. 2.

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subject, the stat. 3 *Jac.* 1., which provides only for commitments in cases of prosecution at the common law, does not apply to the present case. Taking that to be so, the stat. 27 *Geo.* 2. c. 3., which is in *pari materia*, does not extend the authority of the justice as to ordering the payment of expences; only it shifts the payment of them from the parish to the county. That was its only object as it regards the stat. 3 *Jac.* 1., which it recites; and therefore however large the words of the enactment, it must be construed with reference to the former statute; and that it contemplated the same kind of offenders only as the former, is apparent from this, that the 3d section provides for the allowance of expences to witnesses who shall attend in court to give evidence against *felons*. A deserter is not committed as a felon for trial, or to be punished by imprisonment in the gaol, but, by the express provision of 53 *Geo.* 3. c. 17. s. 106. (mutiny act) "to the end that he may be removed to such places as the secretary at war shall direct;" and the gaoler is to receive "such subsistence for his maintenance while in custody, as by his majesty's regulations shall be directed:" so that in no respect is the method observed upon the commitment of a deserter like that of other offenders. And by s. 107. the constable is entitled to a distinct reward for the apprehension of deserters. The question therefore reverts back to the stat. *Jac.* 1., which, for the reasons above mentioned, it is submitted, must receive a restrained construction conformably to the preamble; and oftentimes such a construction has been adopted; as in *Ryall v. Rolfe* (a) Lord *Hardwicke* strongly inclined to be of

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(a) 1 *Atk.* 182.

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opinion with *Holt* C. J. and *Parker* C. B., that the stat. 21 *Jac.* 1. c. 19. s. 11. was, by reason of the preamble, restrained to goods that were originally the bankrupt's.

LORD ELLENBOROUGH C. J. It cannot by any means be regarded, as an universal rule, that large and comprehensive words in the enacting clause of a statute are to be restrained by the preamble. In a vast number of acts of parliament, although a particular mischief is recited in the preamble, yet the legislative provisions extend far beyond the mischief recited. And whether the words shall be restrained or not must depend on a fair exposition of the particular statute in each particular case, and not upon any universal rule of construction. Here the convenience seems to be as universal, as is the provision in the enacting clause of the statute; that when any person, not having goods or money sufficient to bear the charges himself, is committed to gaol by warrant from any justice, the justice shall, on application to him, ascertain the expences and order the treasurer of the county to pay the same. The language is express, clear, and explicit, and large enough to embrace this case, and it contains no exception, neither does the policy of the act, as it seems to me, require that there should be any exception. I therefore think that this indictment is well enough.

LE BLANC J. The object of the statute was to provide for defraying the expences of public officers, which they were necessarily put to in the discharge of a public duty. And although the statute *Jac.* 1. in the preamble looked only to the most obvious cases, where the person

was afterwards to be tried by the ordinary process of the country, yet when we come to the enacting clause, we find in it words large enough to embrace this case. And, if the Court see that the policy of the law requires it, they will surely be inclined to adopt that construction which will bring this case within the enacting clause, although the precise case may not have been originally contemplated in the preamble.

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against
Pierce.

BASSETT J. I am entirely of the same opinion. I do not agree with the counsel in his construction of the stat. 21 Jac.; the contrary has been decided in *Macr v. Cadell*. (a)

DAMPIER J. The words in the enacting clause of stat. G. 2. are large enough, and there is nothing to restrain them.

Judgment for the Crown.

Gaselee was to have argued contra.

(a) *Corp.* 232.

The KING against DE BERENGER and Others.

Monday,
June 20th.

DE BERENGER and seven others were tried at the London sittings after last term, before Lord *Ellenborough* C. J. upon an indictment for a conspiracy; and

It was held an indictable offence to conspire on a particular day by false rumours

to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day; and that the indictment was well enough without specifying the particular persons who purchased, as the persons intended to be injured, and that the public government funds of this kingdom might mean either *British* or *Irish* funds, which since the Union were each a part of the funds of the United Kingdom.

The Court will take judicial notice that a war exists between this country and a foreign state, which war is recognized in different acts of parliament, and therefore an allegation to that effect need not be proved.

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The King
against
Dr BRENCH.

upon not guilty, the jury found them guilty upon the 3d and subsequent counts.

The indictment set forth by way of general inducement, that at the time of committing the several offences, &c. there was and for a long time before, to wit, two years and upwards, had been an open and public war between our lord the king and his allies, and the then ruler of *France*, to wit, *Napoleon Bonaparte*, and the people of *France*; and the 3d count stated that the defendants on the 19th of *February* in the 54th year of the King unlawfully contriving, &c. by false reports, rumours, arts, and contrivances, to induce the subjects of the king to believe that a peace would soon be made between the king and his subjects, and the people of *France*, and thereby to occasion without any just or true cause a great increase and rise of the public government funds and government securities of this kingdom, and to injure and aggrieve the subjects of the king, who should on the 21st of *February* purchase and buy any part or parts, and share or shares of and in the said public government funds, &c., then and there to wit on the 21st of *February* unlawfully, &c. did conspire, &c. to make and propagate and cause to be made and propagated, unto and among divers subjects, &c. in the county of *Kent*, &c., and also unto and among divers subjects, &c. at *London*, and places adjacent thereto, divers false reports and rumours that the said *N. Bonaparte* was killed, and that a peace would soon be made between the king and his subjects, and the people of *France*, and that the defendants would by such false reports and rumours, as far as in them lay, occasion an increase and rise in the prices of the public government funds and other government securities,

with a wicked intention thereby to injure and aggrrieve all the subjects of the king who should, on the 21st of February, purchase or buy any part or parts, share or shares of and in the said public government funds, and other government securities, &c.

All the defendants (except two) now appeared to receive judgment; when *Best Serjt.* on behalf of the defendant *Butt*, and *Park* for *De Berenger*, submitted as an objection to the conviction, that the introductory averment, that there was a war, &c., which was a material averment and applied to all the counts, was not proved at the trial. But Lord *Ellenborough C. J.* answered, that there were so many statutes which spoke of a war with France, that it was impossible for the Judges not to take judicial notice of it; to which *Best Serjt.* replied that he believed none of the statutes spoke of a war with the king and his allies, and France, the alliance being but a recent event. They also moved in arrest of judgment on three grounds, which, they said, applied to all the subsequent counts as well as to the 3d; 1st, that not any crime, known to the law, is alleged in the count; 2dly, that if there be any crime alleged, the persons to be affected by it are not particularized as they ought to be, or that it is stated too generally; 3dly, that it is alleged to have been done with intent to raise the public funds and government securities of this kingdom, that is, the united kingdom of Great Britain and Ireland, whereas nothing is charged which has reference to any other funds or securities than the public funds and securities of England only. 1st, No adjudged case of conspiracy has gone so far as this; the crime alleged is a conspiracy to raise the price of the government funds of this country; but if it be not a crime in

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itself to raise the price of the government funds of this country, a conspiracy to do so will not carry it farther, unless some collateral object be stated to give it a criminal character. Generally speaking, the higher the price of the public funds, the better for the country, because the higher the state of public credit. It is true that the indictment charges that they conspired to raise the funds on a particular day; and the raising the funds on any given day may or may not be criminal according as the day has concern with the transaction; as if it had been shewn that on that day the defendants were possessors of certain shares in the funds, and intended to sell them, and thereby, by raising the price, to cheat the particular persons who should become purchasers; or if the indictment had alleged that it was the day on which the commissioners for reducing the national debt were wont to purchase, and that the defendants did it with intent to enhance the price of such purchases; in these and such like cases, the object being criminal or injurious to the public, what was done with that object would be criminal also: but all that is alleged on this record is general, without shewing to the court, how it was criminal in the defendants to raise the funds, or in what way the public could be injured. As to its being charged per conspiracy, it is true that in *Rex v. Edwards* (a), it is laid down that to conspire to do a lawful act to an unlawful end is a crime; and to that extent the doctrine has been carried in several cases, though formerly the rule relating to conspiracy, as it was defined by stat. 21 Edw. 1., seems to have been restrained to such as

(a) 8 Mod. 321.

conspired

conspired to indict a man falsely and maliciously, or falsely to move and maintain pleas, or to retain persons for maintaining the same. But the case above cited and all the cases prove that it is the end to which the court looks, and that end must be unlawful. Wherefore in *Rex v. Starling* (a), the defendants being acquitted of all but conspiring to impoverish the farmers of the excise, it was objected that there was no offence; but the Court held it well, because the information shewed that the excise was parcel of the revenue of the crown, and so the impoverishment of the farmers of excise tended to prejudice the revenue of the crown. And to the same effect in *Reg' v. Best* (b) it was agreed by the Court, that several people may lawfully meet and consult to prosecute a guilty person; otherwise if to charge one that is innocent, right or wrong, for that is indictable. So that unless the end be unlawful there is no offence; and therefore, 2dly, if the indictment had stated certain individuals by name who purchased stock on the day laid, and that the defendants conspired to raise the price in order to cheat or prejudice those individuals or to benefit themselves at their expence, or that the public were concerned in the purchases of that day, and the defendants conspired, &c. to the prejudice of the public, the offence would have been complete; but it is not enough to allege generally that it was to the injury and grievance of all the subjects who should buy stock on the day; and for a similar default in the indictment in *Rex v. Robe* (c), the judgment was arrested. And the only exception in which the law allows of a general form of indictment,

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(a) 1 Sid. 174.

(b) Salk. 174.

(c) 2 Str. 999.

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Dr. Bentley.

is in the case of barrety, or a common scold (a), and that is upon the reason of the thing, because those offences consist of a multitude of instances which it would be inconvenient to set forth. Lastly, the indictment is framed upon a supposition that there are funds which are the general funds of the united kingdom of *Great Britain and Ireland*, for after styling his Majesty King of the united kingdom, it speaks of the funds of this kingdom, i. e. of the kingdom of which his Majesty is before styled King, whereas there are no general funds of the united kingdom, but they are distinctly the funds of each kingdom, as they are respectively charged on and applied to each; and by the 7th article of the act of union, it is expressly provided that the charge for the payment of interest and debt incurred in either kingdom before the union shall continue to be separately defrayed by *Great Britain and Ireland* respectively.

Lord ELLENBOROUGH C. J. I am perfectly clear that there is not any ground for the motion in arrest of judgment. A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumours to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a

(a) See *Palfrey's case*, Cro. J. 527. *The Queen v. Hannon*, 6 Mod. 311.

fraud

being levelled against all the public, for it is against all such as may possibly have any thing to do with the funds on that particular day. It seems to me also not to be necessary to specify the persons, who became purchasers of stock, as the persons to be affected by the conspiracy, for the defendants could not, except by a gift of prophecy, divine who would be the purchasers on a subsequent day. The excuse is, that it was impossible they should have known, and if it were possible, the multitude would be an excuse in point of law. But this statement is wholly unnecessary, the conspiracy being complete independantly of any persons being purchasers. I have no doubt it must be so considered by law according to the cases. Upon the last point, in a large sense the *Irish* funds are the funds of this kingdom, and so are the *British*, they form the resources and means of the United Kingdom. The *Irish* funds believe are purchased and sold in the market here, and the interest is payable in this country, and they, as well as the others, though strictly applicable to each kingdom, could not in a large sense be correctly called otherwise than the funds of the United Kingdom; since in union they are each a part of the stock and revenues of the United Kingdom, however they may be defrayed separately as they antecedently were.

LE BLANC J. This motion in arrest of judgment is made on three grounds; 1st, that it is not a crime in itself to raise the price of the funds. But we are to look to the indictment in order to see what is the charge; and the charge in the indictment is that the defendants conspired by false rumours to raise the price of the funds on a particular day. It may be admitted therefore that the

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the raising or lowering the price of the public funds is not per se a crime. A man may have occasion to sell out a large sum, which may have the effect of depressing the price of stocks, or may buy in a large sum, and thereby raise the price on a particular day, and yet he will be guilty of no offence. But if a number of persons conspire by false rumours to raise the funds on a particular day, that is an offence; and the offence is, not in raising the funds simply, but in conspiring by false rumours to raise them on that particular day. Upon the 2d objection, which is that the indictment does not specify the persons who were to be defrauded, it follows from the nature of the charge, that they could not be named, because this is a charge of a conspiracy on a previous day to raise the funds on a future day, so that it was uncertain who would be the purchasers. The offence being to raise the funds on a future day, its object was to injure all those who should become purchasers on that day, and not some individuals in particular. In the same manner it is if a false rumour be spread on a day prior to a market day, in order to raise the price of a commodity in the market, whether it be an article of necessity or not. The 3d objection is founded upon the indictment's calling them the public funds of this kingdom, which it is said since the union must mean the United Kingdom of *Great Britain* and *Ireland*. But so they are the public funds of the United Kingdom, and go in furtherance of the service of the United Kingdom, although particular sums are applied to the particular service of one part of the United Kingdom only. It appears to me therefore on all three objections that there is no reason why

why we should pause to consider whether this judgment should be arrested.

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BAYLEY J. If the case admitted of any doubt I should be desirous of farther time to consider it; but I have no doubt that there is not any foundation for the objections that have been made. To raise the public funds may be an innocent act, but to conspire to raise them by illegal means, and with a criminal view, is an offence; an offence, perhaps not affecting the public in an equal degree, as if it were done with intent to affect the purchases of the commissioners for the redemption of the national debt, which would be affecting the public in its aggregate capacity; but still, if it be completed, it will certainly prejudice a large portion of the king's subjects who have occasion to purchase on that day. And it is not necessary to constitute this an offence that it should be prejudicial to the public in its aggregate capacity, or to all the king's subjects, but it is enough if it be prejudicial to a class of the subjects. Here then is a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours, is by illegal means. And the end is illegal, for it is to create a temporary rise in the funds without any foundation, the necessary consequence of which must be to prejudice all those who become purchasers during the period of that fluctuation. The next objection is, that the indictment does not state the persons by name whom the defendants intended to defraud, and it is suggested that the indictment would have been good if it had stated that the conspiracy was with intent to prejudice certain persons by name, and that by means thereof those persons were prejudiced.

But

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But the conspiracy is the thing which constitutes the crime, and it is sufficient if the indictment state the conspiracy as it existed at the time when the crime was complete. It might have been detected before any purchases were made or the mischief was effected, yet that would not have altered the offence, because the parties had done every thing in their power, and all that was essential to complete the crime, when they had formed the conspiracy, and used illegal means for effecting it. It did not depend on them but on others whether their conspiracy would be mischievous to others, but their criminality must depend on their own act, and not on the consequences that ensued from it. Another objection has been made, that the indictment speaks of the funds to be raised by this conspiracy as the funds of *this kingdom*, and that there are no funds of *this kingdom*. It is perfectly true that, since the Union, the funds are raised in certain proportions upon one part of the kingdom and upon the other, but they are raised by the legislature of the kingdom, and when raised are applied by the government under the authority of parliament to such purposes as parliament may direct. But notwithstanding they may be found in part only applicable to *England* and in part to *Ireland*, yet they constitute the funds of the kingdom, and may be so called, though separated into *British* and *Irish* funds.

- DAMPIER J. The charge in this indictment is, that the defendants by false rumours conspired to give a temporary rise to the funds of this kingdom, in order to deceive those persons who should purchase into the funds on a particular day. I own I cannot raise a doubt but that this is a complete crime of conspiracy according

ording to any definition of it. The means used are
 ong, they were false rumours; the object is wrong, it
 s to give a false value to a commodity in the public
 rket, which was injurious to those who had to pur-
 use. That disposes of the first objection. The 2d
 ection is, that the persons injured ought to have been
 ned; to which one answer is, that the criminality is
 mplete, when the concert to bring about a mischiev-
 s object by illegal means is complete; it is not ne-
 ssary that the object should be attained. Therefore
 re was no need to set out the name of any person,
 ause no person need be injured. That is the first
 rwer; and the next is, that it was impossible the
 endants could know who those persons would be.
 is said, that as the indictment was not preferred until
 er they were known, it might therefore have named
 persons; but if that were to be required, it would
 making the consequential damage a necessary part
 the crime. That disposes of the 2d objection. The
 objection, that there are no funds of this king-
 m, because there are none which are raised at the
 mmon charge of both parts of the United Kingdom,
 y be answered thus. Each fund, as it is raised from
 her part of the United Kingdom, becomes, when
 sed, strictly a part of the funds of the United King-
 m; the United Kingdom is answerable for them,
 d they are for the benefit of the United Kingdom,
 ether applied to one part of it or to the other. It
 ns to me therefore that they are better described in
 s, than in any other way. For these reasons I
 nceive that there is not any ground laid for arresting
 e judgment.

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Tuesday,
June 21st.READ *against* SOWERBY.

The proving a debt under a commission of bankruptcy, issued against a person who had before compounded with his creditors, and whose estate under the commission had not, nor would, produce 15s. in the pound, but who, before he became bankrupt, paid the creditors with whom he compounded, the full amount of their debts, was held to discharge the bankrupt in respect of his future estate and effects from an action for the debt so proved.

It seems that the proving a debt under a commission, is an election by the creditor, within the stat. 49 G. 3. c. 121. s. 14. which deprives him of his remedy by action against the bankrupt in the cases excepted in stat. 5 G. 2. c. 30. s. 9.

ASSUMPSIT against the defendant as acceptor of several bills of exchange, with the common counts. Pleas, non assumpsit, and general plea of bankruptcy, and, 3dly, that after the passing of the 49 G. 3. c. 121., and after the making the promises in the declaration, and after the causes of action therein specified had accrued, to wit, on the 1st of *May* 1811, the defendant became bankrupt within the intent and meaning of the statutes concerning bankrupts, and a commission issued against him, by virtue of which he was declared a bankrupt on the 4th of *May*, and that the plaintiff, before the exhibiting of his bill, proved under the commission the said causes of action, as and for a debt due to him from the defendant, being the same debt for the recovery whereof this action is brought, and did thereby make his election to take the benefit of the said commission, with respect to the said debt so proved by him. Replications as to the first and second pleas, similiter; and as to the last, admitting that the causes of action accrued before the bankruptcy of the defendant, that after the 24th of *June* 1732 (mentioned in stat. 5 G. 2. c. 30. s. 9.) and before the defendant became bankrupt, to wit, on the 1st of *January* 1788, he compounded with his creditors, and that the estate of the defendant hath not produced nor will produce after all charges sufficient to pay 15s. in the pound.

Rejoinder, that after the defendant compounded with his creditors, and before he became bankrupt, to wit,

on

on the 1st of *January* 1810, he paid and satisfied all his creditors with whom he compounded the full amount of their debts.

Demurrer, and joinder.

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Holroyd, in support of the demurrer, contended that the rejoinder was ill, inasmuch as where a commission issues against a person, who has compounded with his creditors, although, before his bankruptcy, he pay those creditors their full debts, his future estate and effects remain liable, unless his estate under the commission shall produce 15s. in the pound. He said, that the case fell directly within the stat. 5 G. 2. c. 30. s. 9., which uses the words, "shall have compounded with his creditors," without making any distinction, whether those creditors shall afterwards be satisfied or not; and it is within the mischief of the act, because the bankrupt has had all the benefit, for a certain time at least, of a composition, till he could satisfy his creditors the full amount of their debts; and in the interim, the creditors have sustained a damage by the delay. The crime, therefore, if it may be so called, of non-payment, was complete at one time, and the subsequent payment in full may have been the very cause of his bankruptcy. And in *Thornton v. Dallas* (a), this point seems to have been decided; for there, though the prior commission was superseded by consent, it was held that the bankrupt's estate was not discharged under a second commission, unless 15s. in the pound were paid under it; and Lord Mansfield said, "the only question was, whether a supersedeas can make a thing not to have been done which, in fact, has been done." Also the

(a) *Dougl.* 46.

replica-

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replication is a good answer to the plea, because the proving a debt under a commission against a person who has before compounded with his creditors, shall not be deemed an election by the creditor to take the benefit of such commission within the stat. 49 G. 3. c. 121. s. 14., so as to deprive the creditor of his remedy against the future effects, unless the bankrupt's estate shall produce 15s. in the pound. The stat. 5 G. 2. c. 30. s. 9. expressly excepts the case of a commission, under such circumstances, from operating as more than a discharge of the person, leaving his future effects liable as before. And *Philpott v. Corden* (a), *Haviland v. Cook* (b), and *Jelfs v. Ballard* (c), shew that after a certificate under a second commission, an action will lie against the bankrupt in respect of his future effects, without waiting to see whether his estate will produce 15s. in the pound. Then the 49 G. 3. c. 121. s. 14. was not intended to repeal the former statute, or to deprive the creditor of the benefit thus saved to him, but only to make his proving under a commission, an election by him to take the benefit of such commission, so far as to forego his right of action against the bankrupt at the common law.

Lord ELLENBOROUGH C.J. If the act so meant, *quod voluit non dixit*. It seems to me that the act is introductory of a new state of things arising out of the creditor's proving his debt under the commission, it shall be deemed an election by him, to take the benefit of such commission with respect to the debt so proved.

(a) 5 T. R. 287.

(b) *Ib.* 655.(c) 1 B. & P. 467. See also *Coverley v. Morley*, 16 East, 225.

"Election," here, imports that he renounces his other rights for the sake of that which he elects.

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against
SOWBESY.

LE BLANC J. The statute uses general words without any restriction, and I see no reason why they should not be understood in their generality.

DAMPIER J. This is not a remedy under the commission; and the statute says, now that he has proved under the commission, he shall be deemed to have elected to take the benefit of such commission with respect to the debt proved; *i. e.* to come in *pari passu* with the rest of the creditors. The statute meant to take away the remedy by action.

Per Curiam,

Judgment for the Defendant.

Richardson was to have argued *contra*.

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Tuesday,
June 21st

HORWOOD and Another, Executors of W. COARE
deceased, *against* UNDERHILL.

Where upon the execution of an annuity bond by three out of several obligors, the grantee of the annuity paid the consideration-money to D. S., one of the three, who immediately paid it into a banker's in the names of himself and J. L., the attorney who acted for all parties, and took the banker's receipt for the money in the names of himself and J. L., which was done in consequence of the other obligors not attending to execute the bond, it being agreed by the parties then present that until the securities should be

executed the money should remain in the hands of the banker, and afterwards, upon the execution of the securities, the money was paid at the banker's with the authority of J. L. to D. S., and upon debt brought by the executors of the grantee on the annuity bond, the condition of which, on oyer, stated that the grantee paid the money to the obligors, and the memorial stated that the money was paid to D. S. to the use of himself and the other obligors by the grantee: Held that a plea alleging that in the assurances the consideration-money was stated to be paid by the grantee, and that it was not stated in the assurances that the sum was advanced by any agent or agents of the grantee, and that the same was advanced on behalf of the grantee by J. L. and D. S., was to be taken as pleaded with reference to the annuity act 17 G. 3. c. 26., and that it raised an objection which was sustained by the facts, and invalidated the bond.

DEBT on bond, dated 24th December 1796, in the sum of 2800*l*. The defendant craved oyer of the bond; which was a joint and several bond from the defendant and five others to the testator. He also craved oyer of the condition, which recited that the obligors had agreed with Coare (the testator) to grant him an annuity of 15*l*. 1*s*. 1*d*. for the life of the survivor of them (the obligors) for the price of 1400*l*., which sum Coare had that day paid to the said obligors, and the condition was for the payment of the annuity in manner therein stated. And after setting out the memorial, which stated the above bond to be dated the 24th of December 1796, and to be in consideration of 1400*l*., that day paid to all the obligors, and that the said sum of 1400*l*. was in fact paid to D. Smith (one of the obligors) to the use of himself and the other obligors, by Coare, the defendant pleaded, 4thly, that the said sum of 1400*l*. in the said writing obligatory mentioned, and by the memorial alleged to have been paid on the 24th of December 1796, was not paid on the said 24th of

December. 5thly, That the said sum of 1400*l.* was not paid to *D. Smith* to the use of himself and the other obligors until the 26th of *December* 1796. 6thly, That the said sum of 1400*l.* was not paid to *D. Smith* for the use of himself and the other obligors as in the said memorial was alleged. 13th plea, That in the assurances, whereby the said annuity was granted, it was stated that *Coare* paid the said sum of 1400*l.* as the consideration of it, and that it was not stated in any part of the said assurances that the said sum was advanced by any agent or agents of *Coare*, and that the same, in the absence of *Coare*, was advanced on behalf of *Coare* by one *J. Lowe* and *D. Smith*. 14th plea, That it is not set forth or described in any part of the said assurances that the said sum of 1400*l.* was advanced on behalf of *Coare* by any agent or agents of *Coare*, and that the said sum was advanced as the consideration for the grant of the said annuity in the absence of *Coare*, on behalf of *Coare*, by a certain then agent or certain then agents of *Coare*. Issue taken on these several pleas. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Trinity* term, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case, the material facts of which are these :

The above bond, and a warrant of attorney thereon, having been prepared by *J. Lowe*, an attorney, in pursuance of instructions given to him by *D. Smith* in the presence of the testator and the defendant, the bond was executed by three of the obligors, viz. the defendant, *D. Smith*, and one other, on the 24th of *December* 1796, and a receipt for the consideration-money was signed by them ; but no part of that money was paid

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to either of the obligors before or at that time. Immediately after the execution and signature by the three, *Lowe* went with them to the house of the testator, who accompanied them to a banking house, where the testator received three bank-notes, amounting together to 1400*l.*, and gave or paid them to *Smith*. *Smith* immediately paid them into the same banking house, in the names of himself and *Lowe*, and took the bankers' accountable receipt as follows: "Received 24th December 1796, of Mr. *D. Smith* and *J. Lowe*, fourteen hundred pounds on account, to account for on demand." The 1400*l.* were so paid into the hands of the bankers in consequence of the other parties not attending on that day to execute the bond and sign the receipt, and as one of them was stated to be prevented from attending by an accident, it was proposed that one *Giblett* should execute a bond and warrant of attorney, as surety to the testator for the payment of the annuity, and it was agreed and understood by the parties then present, that in the meantime, until *Giblett* and the two other parties to the first-mentioned bond and warrant of attorney should respectively execute the securities, the 1400*l.* should remain in the bankers' hands. *Giblett* executed his bond and warrant of attorney on the next day, and the other two parties executed theirs before the 26th of December; on which day *Smith* called on *Lowe* for the purpose of obtaining his authority to receive the 1400*l.* from the bankers, when *Lowe* either accompanied him to the bankers to receive the same, or signed an authority for that purpose on the back of the accountable receipt, which remained in *Smith's* possession, and the money was thereupon paid to *Smith*, and the receipt delivered:

up to the bankers. It was represented to *Lowe* at the time of giving him the instructions that all the parties to the bond and warrant of attorney were to be principals, and he so understood at the time of the first execution by the three, and *Lowe* acted as attorney for all parties. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover; if they are, the verdict to stand; if not, a nonsuit to be entered. And the point made was, whether any of the pleas were sustained by the facts stated, so as to invalidate the annuity, by reason of stat. 17 G. 3. c. 26.

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against
UNDERHILL.

Hobroyd for the plaintiff argued that not any of the pleas were sustained by the facts stated; and as to the 4th and 5th and 6th pleas, he relied on *Coare v. Giblett* (a); and as to the 13th and 14th pleas, he said that it was not any objection to the assurances that they stated the payment of the consideration-money to have been made by *Coare*; for so in effect it appears to have been, inasmuch as *Coare* parted with the money and paid it into the hands of *Smith* and *Lowe*, the one being agent of the grantors, and the other agent of all parties, upon a condition, and it was afterwards paid over to *Smith*. This point seems to have been determined in *Craufurd v. Phillips* (b), for there it was held that the consideration-money was well stated in the deed to have been paid by the grantee of the annuity to the grantor, it having been deposited by the grantee in the hands of an agent for both parties, to be paid over by him when the grantor should have executed, and upon his execution having been so paid over: and

(a) 4 *East*, 85.(b) 2 *New R.* 141. 9 *Fes.* 214. 13 *Fes.* 475.

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the Court intimated a clear opinion, that a payment to the agent was a payment to the principal, which reasoning applies to the present case. And here the pleas do not state or incorporate the annuity act.

Knox, for the defendant, upon the 4th and 5th pleas, adverted to the dissatisfaction which the Chancellor had expressed at the decision of *Coare v. Giblett* (a), and contended that as the annuity act, 17 G. 3. c. 26. required the consideration to be set forth in the memorial, that was not complied with unless the memorial stated the true day of payment; because the time when paid might form a material part of the value of the consideration. And as the legislature has required that the memorial should contain, with minute particularity, the whole *res gesta*, it would be strange if so material a fact as the day of payment of the consideration-money might be omitted. And he cited *Kirkman v. Price* (b), *Rumball v. Murray* (c), *Berry v. Bentley* (d), *Pool v. Cabanes* (e). Upon the other point he said, that *Craufurd v. Phillips* only decided that payment to the agent of the grantor was payment to the grantor, on the general principle of law, and because the act did not require the name of the person to whom the money was paid to be inserted in the deed.

Lord ELLENBOROUGH C. J. The only corporal act of payment by *Coare* on the 24th is by his delivering the money to *Smith*, not *animo solvendi*, but only to him as a trustee to do a particular act, viz. to lodge the money in the hands of the bankers, until the secu-

(a) See 10 Ves. 209.

(b) 1 H. Bl. 309.

(c) 3 T. R. 298.

(d) 6 T. R. 690.

(e) 8 T. R. 328.

ties were perfected. *Smith* received the money in a different character from that of a principal, to retain it in medio till some farther act was done, and then to pay it over. And the payment made on the 26th was clearly the act of agents. With reference, therefore, to the annuity act, to which these latter pleas, having specially alleged how the assurances are defective, must be taken to refer, I am afraid these pleas cannot be sustained. The objection being expressly taken upon the annuity act, it is not enough to have stated the payment as it might enure in point of law. The legal result would not give the information which the act requires. The language of the act is that the assurance shall set forth the name of the person by whom the consideration shall be advanced, which has not been satisfied. I do not, however, see any reason to change the opinion we formed in *Coare v. Giblett*.

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LE BLANC J. It appears that *Coare* would not have paid the money to *Smith* but upon condition of his lodging it at the bankers; which, therefore, cannot be considered as an absolute payment.

DAMPIER J. The 13th and 14th pleas refer clearly, though not specifically, to the provisions of the annuity act, which is a public act that we are bound to take judicial notice of. On oyer we see that this is an annuity bond, and we see that such matters are alleged in these pleas, as expressly refer to what the annuity act requires; and on the evidence it appears that the money was not paid absolutely by *Coare*, but that he passed it into the hands of *Smith* and *Lowe* upon an understanding that it should be impounded at the

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bankers'

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bankers' until a future event. *Smith* and *Lowe* were only the depositories of the money to secure the execution of the instruments by the other parties, and afterwards the money was paid by them as the agents of the grantee. It having been decided that where the pleas are only in general terms, without reference to the annuity act, the objection is not well raised, that the money was paid by the agent of the grantee (*a*), where the objection is clearly raised with reference to the statute, that makes the difference; and the pleas need not incorporate the act of parliament; it is enough if they clearly refer to it.

Per Curiam,

Judgment of Nonsuit.

(*a*) See *Coare v. Giblett*, 4 *East*. 85.

Wednesday,
June 22d.

BRISCOE, Bart. against The Earl of EGREMONT
and Others.

If a peer be
sued jointly
with others by
bill of *Middlesex*, the Court
will set aside
the proceedings
as against the
peer.

PALEY shewed cause against a rule for setting aside the proceedings for irregularity, obtained on the ground that the defendant, a peer, had been served with a copy of a bill of *Middlesex*, issued against him jointly with the other defendants. He said that the action was brought under an inclosure act, for the purpose of trying a right, and the Court would leave the defendant to plead his privilege in abatement; and here the affidavit does not shew him to be a peer. And he cited *Lord Lonsdale v. Littledale* (*b*), and *Hosier v. Lord Arundell*. (*c*)

(*b*) 2 *H. Bl.* 267. 299

(*c*) 3 *B. & P.* 7.

Littledale,

Littledale, contrâ. A bill of *Middlesex* is irregular, for it contains a *capias*, which never lies against a peer. And in 1 *Ventr.* 298. *Anon.* a bill of *Middlesex* issued by an attorney was discharged by supersedeas without pleading, because it appeared by the record that the defendant was a peeress, and the attorney was committed for suing out the process. And though a peer be sued jointly with others, yet it must be by original writ; and as to its not appearing by the affidavit that he is a peer, he is described on the process as Earl of *Egremont*, and so called in the inclosure act, besides being so recognized in several other public acts.

1814.

BRISCON
against
I.D. EGREMONT.

The Court held the proceedings irregular as far as they related to the Earl of *Egremont*, and to that extent made the

Rule absolute.

LAING *against* BOWES.

Wednesday,
June 22d.

THE defendant gave a bond conditioned for the payment of money to the plaintiff, which bond was executed by the defendant, and attested by two witnesses in the *Isle of Man*, and was afterwards sent to the plaintiff in *Scotland*, where he resided. The plaintiff sued the defendant on the bond, who pleaded non est factum, upon which issue was joined, and the plaintiff being unacquainted with the subscribing witnesses and their place of residence filed a bill against the defendant for a discovery, to which the defendant put in an answer admitting the execution, but denying any knowledge of the subscribing witnesses. The plaintiff's attorney being

Expences of a person sent to inquire after the subscribing witnesses to a bond not allowed in the taxation of costs.

1814.

 LAING
 against
 BOWES.

being advised that he could not safely proceed to trial without it, sent his clerk to the *Isle of Man* and other places in search of the said witnesses, having previously given notice to the defendant to inform the plaintiff on or before a given day, where the witnesses were to be found if living, and that if he neglected or refused to give such information, a person would be so sent to the *Isle of Man* and other places, and his charges would be claimed against the defendant upon the taxation of costs, notwithstanding which notice the defendant declined giving such information. Afterwards upon taxation of costs the plaintiff claimed 38*l.* 6*s.* for these charges, which the Master refused to allow.

And now *Comyn* moved upon the above facts that the Master might review his taxation; but the Court asked if he had any authority for the Court's allowing the expences of sending persons to inquire after witnesses; and no authority being cited to that effect, Lord *Ellenborough* C. J. said, that although the present was a hard case, he was not inclined in the absence of any precedent to yield to the application; and perhaps if the circumstances, as now stated, had been proved at the trial, they might have afforded ground for letting in secondary evidence of the defendant's hand-writing.

LE BLANC J. added, that to grant the rule would be opening a door to all sorts of expence.

Per Curiam,

Rule refused.

1814.

MEAD *against* BRAHAM.*Thursday,*
June 23d.

A RULE nisi was obtained for discharging the defendant out of custody on filing common bail, upon an affidavit of the defendant and another, which stated that the defendant in *August* 1812 being indebted in 1500*l.* to the plaintiff, accepted three bills of exchange of 500*l.* each, drawn on him by the plaintiff to his own order. In *April* 1813 the defendant became bankrupt, and a commission issued against him; and the several holders of the said bills, who had arrested him thereon and brought their actions against him as indorsees, afterwards proved the same under the commission in the presence of the plaintiff, and discontinued their said actions to the plaintiff's knowledge; and the commission was still in force, and the said debts not expunged, and the said holders would be entitled to a dividend. That since the bills were so proved, the plaintiff had, as drawer, brought an action on them and lodged a detainer against the defendant, and held him in custody for 1500*l.*, upon an affidavit of the plaintiff "that he (the defendant) was justly and truly indebted to the plaintiff in 1500*l.* as the acceptor of three several bills of exchange for 500*l.* each, (setting out the bills which were payable at a time then past, and before the time of the bankruptcy,) and which said three several bills of exchange have been returned to the deponent for non-payment," &c. The affidavit of the plaintiff, in answer, admitted the arrest of the defendant, and proving of the bills by the several holders, under the commission, but stated that in *March* 1814 the plaintiff paid the
amount

The drawer of a bill of exchange, who has paid the amount to the holder after a commission of bankruptcy issued against the acceptor, may sue the acceptor, before he has obtained his certificate, and arrest him upon the bill, notwithstanding the holder has proved the bill under the commission.

1814.
 MEAD
 against
 BRANHAM.

amount of the bills to the then holders, two of whom were the same who proved under the commission; and that he (the plaintiff) never concurred in the said commission, but on the contrary was engaged with other creditors in a petition to supersede it for fraud and collusion, and that he had obtained the consent of the parties who had so proved the bills under the commission, that their proof should be expunged, of which he had given the defendant notice.

Marryat shewed cause, and contended that under these circumstances the plaintiff was entitled to sue the bankrupt, being remitted to his original right upon the bills, as soon as he was compelled to pay their amount to the several holders; and the bankrupt not having obtained his certificate, the plaintiff's rights were not to be affected by the holders of the bills having proved them under the commission, to which commission, so far from being a party, it appeared that the plaintiff was engaged in endeavouring to supersede it. He referred to *Young v. Hunter*. (a)

Abbott, contra, insisted that by stat. 49 G. 3. c. 121. s. 8. the plaintiff, by paying the bills, stood in the place of the creditors who had proved them under the commission, and became entitled to the dividends under such proof; and therefore by s. 14. it was not competent to him to maintain any action in respect of them against the defendant. The defendant, if he had obtained his certificate, would certainly have been discharged of this action; for by sect. 8. if he shall obtain his certificate he shall be discharged of all demands, at the suit of every

(a) 16 East, 252.

person

person thereby enabled to prove, or to stand in the place of the creditor who has proved; and if the certificate would be a discharge, why should not the proof also be deemed an election within the statute?

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against
BRANHAM.

Lord ELLENBOROUGH C. J. inquired if there were any words in the statute compulsory upon a party, who pays the debt for which the bankrupt is liable, to come in under the commission, for if not, the proving under the commission could only be deemed an election so far as it personally regarded the creditor who proved, but not to affect the right of third persons. And *Dampier J.* added, that it would be hard to deprive the plaintiff of the chance of recovering against the bankrupt, before he has obtained his certificate, because in the event of his obtaining it the bankrupt would be discharged.

Per Curiam,

Rule discharged.

CLACK *against* DIXON.

Thursday,
June 23d.

A RULE nisi was obtained for the plaintiff to declare peremptorily before the last day of the term, or in default thereof that the defendant might be at liberty to sign judgment of non-pros, upon an affidavit of the defendant, which stated that he was arrested and held to bail for 10*l.* and upwards at the suit of the plaintiff in the Palace Court in *December* last, and removed the cause by habeas corpus into this court, and put in and justified bail, at the plaintiff's instance, on the first day of *Hilary* term, and served the plaintiff's attorney with due notice; since which no declaration

If a cause be removed, by defendant by habeas corpus, out of an inferior court, plaintiff is not bound to declare in the court above if he has taken no other steps than compelling the defendant to put in and justify bail there.

had

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 DIXON.

had been delivered or any further proceedings taken by the plaintiff, and the defendant had a good defence.

Marryat shewed cause, and contended that the plaintiff was not bound to follow the defendant into this Court; and here the sum being so small it was not worth while. And he distinguished this from a *recordari facias loquelam*, or *accédas ad curiam*, because in those writs there is a *dies datus*. The declaration upon a *habeas corpus* must be delivered before the end of the second term, after putting in bail, but the plaintiff need not declare at all; and by *R. 16 Car. 2. (a)* he cannot be non-processed for want of a declaration. He has taken no step but compelling the defendant to justify his bail.

LORD ELLENBOROUGH C. J. The plaintiff resists the removal as far as he can by compelling the defendant to perfect his bail, till which time the defendant has not effectually removed it; and then when it is effectually removed he withdraws himself, and determines to have nothing more to do with it. This it seems by the practice he is entitled to do.

BAYLEY J. The defendant does not effect the removal till he has put in bail above.

Per Curiam,

Rule discharged.

(a) See *Tidd's Pract.* 473. 5th edit.

1814.

CALLOW *against* LAWRENCE.Thursday,
June 23d.

ASSUMPSIT on a bill of exchange dated the 28th of July 1812, drawn by one *Pywell*, for 65*l.*, payable to his own order seven days after date, accepted by the defendant, and indorsed by *Pywell* to the plaintiff. Plea, non-assumpsit. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last term, the plaintiff established his case by the usual proof of the several hands-writing. The defence was this: on the 29th of *July*, *Pywell* indorsed the bill to *Taylor*, who discounted it for him, and *Taylor* indorsed it to *Barnett*, who, about two days before it became due, paid it short into his bankers. The bankers presented it for payment when it became due; and upon its being dishonoured returned it to *Barnett*. About a week afterwards *Pywell* called on *Barnett* and paid him the amount of the bill, upon which *Barnett* drew his pen through his own and *Taylor's* indorsement, and delivered up the bill to *Pywell*. It was proved that on the 20th of *February* 1813, the bill was seen in the hands of *Pywell*. The jury under his Lordship's direction found a verdict for the plaintiff. On a former day in this term the Attorney-General obtained a rule nisi for a new trial, on the ground that *Pywell* having taken up the bill, it ceased to be negotiable, and so the defendant was discharged upon the bill; and he cited *Beck v. Robley* (a); 2dly, that the bill should have been re-stamped upon being re-issued after having been taken up.

Where the drawer of a bill payable to his own order, and indorsed by him to *T.* and by *T.* to *B.*, upon the bill being dishonoured, paid the amount to *B.*, who struck out his own and *T.'s* indorsement, and returned it to the drawer, and the drawer afterwards passed it to the plaintiff: Held that the plaintiff might recover against the acceptor.

(a) 1 H. Bl. 89. n.

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Scarlett (with him *Comyn*) now shewed cause; and he distinguished this case from *Beck v. Robley*, because there the bill was drawn payable to the order of a third person, who indorsed it, and if, after it was taken up by the drawer, it had continued negotiable in his hands, that third person would have been liable; for which Lord *Mansfield* said there was no colour. But here the bill being payable to the drawer's own order, and indorsed by him, it continued negotiable in his hands upon his own indorsement, and if he passed it there was no reason why he should not be liable. And in *Gomez Serra v. Berkeley* (a) the point in question seems to have been settled; for there the payees of a promissory note, payable to them or order, indorsed it to the plaintiff, and afterwards paid the note and took it back, and then passed it a second time to the plaintiff; and it was held that the plaintiff might recover against the maker of the note, for the maker of the note was still liable to the payees when they paid the plaintiff this note a second time, and the plaintiff ought to stand in their place. So here, *Pywell*, the drawer of this bill payable to his own order, stands in the same situation as did the payees of the note in that case, which was payable to their order, and therefore here also the defendant, the acceptor, being still liable to *Pywell* when he paid this bill to the plaintiff, the plaintiff ought to stand in *Pywell's* place. And *Pywell* might have sued the defendant on this bill, because the defendant's acceptance amounts to an express promise to pay; and so if *Pywell* might sue, the plaintiff may, subject only to all the equities as between *Pywell* and the defendant; *Brown v. Davies* (b).

(a) 1 *Wils.* 46.(b) 3 *T. R.* 80.

There-

efore it appears that *Beck v. Robley* stands on its peculiar grounds.

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vois, contra, (with him *The Attorney-General*) in-
d that the question was not whether *Pywell* could
sued, but whether the plaintiff could, who it ap-
ed had taken the bill more than six months after it
due and had been taken up. And in *Brown v.*
ies he observed that the bill had not been taken up
paid, but only noted for non-payment. And *Gomez*
z v. Berkeley turned on this point, that there was
vidence that the plaintiff knew of any transaction
een the defendant and the payees to discharge the
ndant. And though *Beck v. Robley* admits of the
ction taken, yet it was not decided upon that, but
the general principle that if a draft be given pay-
to *A.* or order, the purpose is that it shall be paid
or order, and when it comes back unpaid, and is
n up by the drawer, it ceases to be a bill. At all
ts this bill should have been re-stamped when it
re-issued, for it was then a new bill.

ord ELLENBOROUGH C. J. A bill of exchange is
stiable ad infinitum until it has been paid by or dis-
ged on behalf of the acceptor. If the drawer has
the bill, it seems that he may sue the acceptor
n the bill, and if instead of suing the acceptor, he
it into circulation upon his own indorsement only,
oes not prejudice any of the other parties who have
rsed the bill, that the holder should be at liberty to
the acceptor. The case would be different if the
ulation of the bill would have the effect of prejudic-
any of the indorsers. In *Beck v. Robley* if the bill
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had been negotiable it would have had the effect of rendering *Hodgson* liable upon his indorsement, which in point of law was discharged, by *Brown's* taking up the bill. That I think is the distinction, and disposes of that case. Here *Pywell* the drawer became the purchaser of the bill when he paid and took it up out of *Barnett's* hands; the bill was not paid by him *animo solvendi* in order to extinguish it, but only to redeem himself from the situation in which he stood upon the bill; and the bill being indorsed by him, it is not necessary to its being negotiable, that any other party should be prejudiced. I own, I much doubted when the rule was moved, whether I had not been mistaken at the trial; but I think now that my attention has been called to the distinction in *Beck v. Robley* that what I held was right.

LE BLANC J. *Beck v. Robley* was decided upon the consequence that would follow from holding the bill to be negotiable, namely, that *Hodgson* the indorser, whom there was no colour to charge, must have been liable; and striking out *Hodgson's* indorsement, the bill could not possibly be negotiable. As to the objection on the stamp, the answer is that this bill had not discharged its functions.

BAYLEY J. I am of the same opinion. The bill was never discharged as between *Pywell* and the defendant, nor as between the plaintiff and defendant. The payment by *Pywell* to *Barnett* did not in legal effect strike out *Pywell's* indorsement, so as to render the bill no longer negotiable; as in *Beck v. Robley* the payment by *Brown* struck out the indorsement of *Hodgson*. When

the bill came back to *Pywell*, he was remitted to his original rights.

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DAMPIER J. When the rule was moved I was struck with the case of *Beck v. Robley*, and did not perceive the distinction; but the impression it made on me has been removed by the distinction pointed out by Mr. *Scarlett*; and it seems to me to make the whole difference. That case was decided upon the ground that *Hodgson* would be liable if the bill continued negotiable, but there is no such objection here. As to the other objection, it was not a new bill, and therefore a fresh stamp was unnecessary.

Rule discharged.

DOE, on the Demise of EDWARD FREEMAN
BARTLETT, against RENDLE and Others.

Saturday,
June 25th.

EJECTMENT. A verdict was found for the plaintiff at the *Devon* assizes, subject to the opinion of the Court on a case reserved, the material facts of which were these:

Jacob Bartlett, being seised in fee, &c., by his will, dated the 17th of *December* 1745, (after certain devises) devised to *W. Bartlett* and *A. Neck* and their heirs, all other his lands, tenements, hereditaments, and premises, whatsoever and wheresoever, upon trust as to a mes-

Devise of lands to trustees and their heirs in trust to the use of *W. B. B.* and his first and other sons in strict settlement, remainder to *J. B.* and his first and other sons in strict settlement, with power to the trustees from time to time

during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any lease of all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent, &c.: Held that a lease by *W. B. B.* of part of the lands devised, in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised, at one entire rent, viz. the ancient rent for that part which had been anciently demised, was void, for the whole of the lands included in that parcel, as well the lands never before let as those anciently let: but it seems to be good as to the other parcels, which contained only lands anciently demised, and on each of which there was a several reservation of the ancient rent.

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 Doe
 against
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suage and five closes (therein described) to the use of his grandson *Wm. Bickford Bartlett* for life, without impeachment of waste, remainder to the use of the trustees during his life in trust to preserve contingent remainders, remainder to the use of his first and other sons, in tail male, remainder to his grandson *Jacob Bartlett* and his first and other sons, also in strict settlement; and he gave power to the trustees and the survivor, and the heirs and assigns of the survivor, from time to time during the minorities of his said grandsons, or of any other person to whom the premises should descend, and afterwards to any tenant for life under the limitation aforesaid, *to grant any lease or leases of all or any part of the said messuages, lands, tenements, hereditaments, and premises so limited to them as aforesaid, for not exceeding three lives, in possession or reversion, so as upon such lease or leases there be reserved the ancient or accustomed yearly rent or rents, heriot and heriots, and other things usually paid for the same premises, and so as the fine of such lease or leases be paid into the hands of the said trustees or the survivor of them, and the heirs and assigns of such survivor, to the use of such persons as shall be then entitled to the freehold of the said premises, when such leases shall be made during such minority, and afterwards to the tenant or tenants for life.*

The testator died; and *W. B. Bartlett* entered on the premises so devised to him, and by indenture of the 20th of September 1805 demised a part of them, by the names and description of *Yellapool, Baddyford-bridge Meadow, Shortbroom Parks*, and also *all that messuage and tenement, with the orchards, fields, closes or parcels of land and premises thereto belonging, situate in or at Ayls-*

omb, *otherwise* Colley End, within the parish of ton, to *T. Metherell*, for three lives. The pieces *Yellapool*, *Baddyford-bridge Meadow*, and *Short-Parks*, had been demised previously to the will, and each of those pieces the ancient and accustomed rents, &c. were severally reserved; but the other, under the description of "all that messuagè, *Aylscomb*, *otherwise Colley End*," contained, besides anciently and usually demised, two pieces called *combs*, and *Knavesash*, which had never been before let, and which were intended to pass, and were taken possession of by the lessee as passing, and for the whole of the premises comprised under this description, one entire *viz.* the ancient rent, &c. payable for that part of the premises which had been anciently and usually let, reserved. *Metherell* entered into the whole, and paid rent for the same, and the defendants were his tenants or assigns. *W. B. Bartlett* died without issue having survived *J. Bartlett* (the next in remainder who died leaving a grandson, *E. F. Bartlett*, the next in tail under the will, his heir at law; which *Bartlett* was lessor of the plaintiff, and brought judgment for the whole of the premises so demised. The question reserved on this case was, whether the lease was wholly void, or only in part, and in respect of what part. If the Court should be of opinion that the lease was wholly void, the verdict to stand; if they should be of opinion that the lease was not wholly void, then the verdict to be entered for the plaintiff, for such part of the premises as the Court should think he ought to recover, and for the defendants for the rest.

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 Doe
 against
 Rendle.

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DOE
against
RENDLE.

Adam, for the plaintiff, on a former day in this term, contended that the lease was void for the whole of the premises described as situate at *Aylscumb*, otherwise *Colley End*. And 1st, as to *Smallacombs* and *Knavesash*, he argued that they were not demisable under the power; and, 2dly, as to the rest, that they being demised together with *Smallacombs* and *Knavesash* at one entire rent, the rent was issuing out of the whole, which was, therefore, not the ancient and accustomed rent: but he admitted in respect of the other three parcels, viz. *Yellapool*, *Baddyford-bridge Meadow*, and *Shortbroom Parks*, that, the reservation being several of the ancient rent, &c., the lease as to them was good (a). Upon the 1st point he urged that the power being coupled with a condition for the reservation of the ancient rent, &c., such lands only were meant to be included under it as had before been demised; and he relied chiefly on *Tristram v. Lady Balinglass* (b), *Bagot v. Oughton* (c), and *Pomery v. Partington* (d); and as to *Comberford's* case (e), he observed that it was inconsistent with *Pomery v. Partington*, and Lord Hale had said of it, that if it had been res integra, perhaps he should have been of another opinion. Upon the 2d point, besides the authorities mentioned in the judgment of the Court, he also cited the opinion of *Popham C. J.* in *Chudleigh's* case (f), "that if he who hath two several farms, out of which two several rents have been reserved, and where the several usual rents amount but to 40s. per annum, join both in one lease for life, and reserve one rent of four marks per

(a) See *Tanfield v. Rogers*, *Cro. Eliz.* 340.

(b) *Faughan*, 28. See also *Foot v. Marriott*, 3 *Vin. Abr.* 429. pl. 9.

(c) 8 *Mod.* 249. 381. S. C. *Fort.* 332. (d) 3 *T. R.* 665.

(e) 2 *Roll. Ab.* 262. pl. 15. (f) 1 *Rep.* 139.

annum,

annum, it is a forfeiture of his estate; for upon this lease the usual and accustomed rent is not reserved." And in *Mountjoy's case* (a), the rent reserved was sufficient to satisfy the ancient rent as well as for the acre of waste never before demised, which is not so here, and yet the lease was held ill. And he also cited *How v. Whitfield* (b), and the case of *The Earl of Cardigan v. Montagu*. (c)

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Do
against
REMBLE.

Gifford, contra, contended that *Smallacombs* and *Knavesash* were demiseable under the power; and upon that point relied on the generality of the power, which was "to grant leases of all or any part of the messuage and lands so limited to them as aforesaid," without any restriction, except that, as to the lands which had been before demised, the ancient rent, &c. should be reserved. And this construction will satisfy every word of the devise, whereas if it be construed as the plaintiff would have it, then if not any of the lands so limited, or if only one acre, had been before demised, the power would be altogether void, or would be good only for that one acre, which would be absurd. And from *Comberford's case* to *Goodtitle v. Fumcan* (d), the authorities are uniform, with the exception of *Balog v. Oughton*, in favour of the more enlarged construction. And *Pomery v. Partington* was decided upon the intention in that particular case, without meaning to interfere with the former cases. 2dly, Supposing the power restrained to lands before demised, the consequence will be that the lease is void for *Smallacombs* and *Knavesash*, but good for the residue. If the te-

(a) 5 Rep. 3. h.

(b) T. Ya. 110. S. C. 1 Fentr. 339.

(c) *Syden on Powers*, 617. 2d edit.

(d) Dougl. 565.

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nant for life had no power to lease except the lands before leased, then nothing passed by the demise of *Smallacombs* and *Knavesash*, because the lease being made under a power operates by way of appointment, and not by way of demise; and, therefore, though it may work an estoppel as against the grantor in respect of the lands not within the power, yet it cannot enure as passing any interest except in such lands as may pass by the appointment. And so if *Smallacombs* and *Knavesash* cannot pass by the appointment they do not pass at all; and then nothing passes but the lands anciently let, and the ancient rent, &c. is reserved and issuing out of those lands which really passed, and not, as is contended, out of lands which did not pass.

At the conclusion of the argument Lord *Ellenborough* C. J. said, that as to the first point, there was enough, perhaps, to take the case out of the intention which governed *Comberford's* case; and as to the 2d that it might be as well for the Court to look to the cases.

Cur. adv. vult.

On this day Lord *Ellenborough* C. J. delivered the judgment of the Court. After observing that this was an ejectment to try the validity of a lease granted under a power, and, stating the case, his Lordship said, The objection to this lease is confined to the premises at *Aylscomb* or *Colley End*, and as to those premises the objection is this, that the power only warrants the letting of such lands as, before such power, had been accustomedly let, and that the lease is void, not only as to the two pieces of land which never had been let before,

before, but that it is void as to all the premises which are demised with those premises under one entire rent. The defendants on the contrary insist that the power warrants the letting any of the lands included in the devise, whether they had been let before or not; or if not, that the lease is only void as to the two pieces of land, which were let for the first time by this lease; but that it is good as to the residue. Upon consideration, however, we are of opinion, upon both these points, against the defendants. Where there is a power to let so as the ancient or accustomed rent is reserved, it is a question of intention, whether the power is or is not to extend beyond what has been anciently and accustomably demised; and where it can be collected from the nature of the property never before demised, or from any other circumstances, that the power was not intended to go beyond what had before been demised, it will be confined to that property. *Comberford's case*, 2 *Roll. Abr.* 262. *pl.* 15., proceeded expressly upon the ground that it appeared, by the generality of the words, that it was intended the party should have power to lease *all* the land, whether let within the two preceding years (which was the qualification in that case) or not. *Walker v. Wakeman*, 1 *Ventr.* 294. 2 *Lev.* 150. 3 *Keb.* 544. 547. 586. 595. was grounded upon *Comberford's case*, and the decision there only was, that under a general power to let the premises or any part thereof, where the premises consisted of land and tithes, a proviso, that 5s. should be reserved for every acre of land, did not narrow the power so as to prevent the letting of the tithes. The proviso did not imply an intention that it should be so narrowed, and there was nothing else to shew such an inten-

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intention. In *Winter v. Loveden*, Carth. 427. *Ld. Raym.* 267., the only point decided was, that under a power to lease a manor, so as the demise were not of the ancient demesne lands, copyholds could not be leased; and the lease in that case, which was of copyholds only, was accordingly adjudged bad; and the dictum, in that case, that under a power to lease a manor and other lands, so as the lease were not of the demesnes, and so as the ancient rent were reserved, would warrant a lease of the rents and services of the manor, though no rent could be reserved thereon, was a dictum founded upon what must necessarily have been intended by the power; for there was express liberty to let the manor, and as the demesne was excluded, if the rents and services could not be let, no part of the manor could. In *Goodtitle v. Fumcan*, Doug. 565. 4th edit. Lord Mansfield says expressly, that powers are to be carried into effect according to the intention of those who create them. The power there was to demise any of the manors, messuages, &c., so as there were reserved so much, or as great, yearly rents, as were then paid; the only objection to the lease was, that it included the manors which had never been let before, and a fishery; the manors, Lord M. says, were of no value, and the fishery worth only 15s. a-year; and as the power expressly included the manors, he thought the intent was to give leave to demise the whole. He put that case therefore upon the intent, and he noticed and approved of the case of *Bagot v. Oughton*, 8 Mod. 249. 381. and Fort. 332. In *Bagot v. Oughton*, there was a power in a settlement to lease all or any of the premises, mentioned in the settlement, at such yearly rents, or more, as the same were then let at. Under this power a lease

was

was made of the capital mansion-house, which was the family-seat; and of the demesne lands which had never been let before; and, upon a reference from the Lord Chancellor, this Court was unanimous that this was a void lease; and in *Doug.* 573. Lord *Mansfield* considers the nature of the property as manifestly excluding, upon such a settlement, the family-seat, and the lands which lay about it, and had usually been occupied with it; and he says, "No man could intend to authorize a tenant for life to deprive the representative of the family of the use of the mansion-house. The nature of the thing spoke the intent, as forcibly as the most direct words could have done." Lastly, in *Pomery v. Partington*, 3 *T. R.* 665. where a power to let all or any of the manors, messuages, lands, tenements, and hereditaments, so as the usual rents were reserved, was held not to warrant a lease of tithes, which had never been let before, the Judges all consider it as a question of intention, and look upon the intention of the parties as the point, which is to govern the construction. In *Bagot v. Doughton* the nature of the property proved the intention, and in this case we think the intention as plainly proved by the character of some of the parties to whom the power is given. It is to the trustees *W. Bartlett* and *A. Neck* that the power is in the first instance given, and we think it never could have been intended that they, who might have had an interest for a day only, and who were not intended to have any beneficial interest for themselves, should be able to alter the nature of the property, and prevent the tenant for life from occupying what the testator had always reserved for his own occupation. The necessary purposes of the power, as far as we can see, will be fully satisfied, by suffering the

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trustees, and the tenants for life, to let what had been let before; and we are therefore of opinion that when they went beyond that, their power was exceeded, and consequently that this lease, at least as to the two pieces never let before, was a bad lease. The other point, whether the lease is bad as to these two pieces only, or whether it is not bad as to all, that is, at *Aylscorb* or *Colley End*, and included with those two pieces under one entire rent, seems upon the authorities to be settled. In *Co. Litt.* 44. *b.* it is laid down that if a lease be made under 32 *H. 8.* of 20 acres of land, which have been accustomedly letten, and of one acre, which has not, and an entire rent is reserved for the whole, this lease is not warranted by the statute; for the accustomedable rent is not reserved, seeing part was not accustomedly letten, and the rent issueth out of the whole. In *Smith v. Bole Cro. Jac.* 458. a prebendary leased his prebend, without any exception of trees, at 17*l.* per annum. In all former leases, the crab, and such like trees, had been excepted, so that this lease included what had never been before demised: and it was resolved that this lease would not bind the successor, for it was of more than had been anciently let, inasmuch as it included the trees, and it is not the ancient rent where more is let than before. So in *Mountjoy's case*, 5 *Co.* 3. *b.* where the true and ancient rent was to be reserved upon a demise, and a lease was made including an acre of waste, which had never been let before, it was resolved, that in respect of that acre of waste, the rent which was entirely reserved out of the whole, could not be called *verus et antiquus redditus*; for how could it be so called, when it issued out of a thing which was never charged with any rent by any reservation before? These authorities shew decidedly,

cidedly, that that cannot be deemed the ancient and accustomed rent, which is reserved upon lands never let before, as well as upon lands anciently and accustomably let. We are therefore of opinion upon both points against the defendants, and that the verdict must be entered for the plaintiff for all the premises at *Aylscumb* or *Colley End*.

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POCOCK *against* CARPENTER.

Saturday,
June 25th.

MARRYAT shewed for cause against a rule for referring a bill of exchange to the Master, that it had been obtained on the same day on which interlocutory judgment for want of a plea was signed; and that it had been the practice not to move for such rule before the following day.

The plaintiff may obtain a rule for referring a bill of exchange to the Master on the day on which interlocutory judgment for want of a plea is signed.

The Court, after conferring with one of the officers, agreed that such had been the practice where interlocutory judgment was signed upon demurrer; but that there was no such practice in this case. And Lord *Ellenborough* C. J. took the distinction, that if a day be given to the parties upon the record, it might be thought incongruous to deprive either of them of the whole of the day, after he is once possessed of it; but here no day is given, and therefore it seemed more natural that judgment should be entered immediately. The Court, however, added, that if there had been any settled rule of practice to the contrary, they would not have disturbed it.

Rule absolute.

Reader was in support of the rule.

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*Monday,
June 27th.**Cook against Cox.*

In a declaration for slander of plaintiff in his trade, a count alleging that the defendant, in a certain discourse in the presence and hearing of divers subjects, falsely and maliciously charged and asserted and accused plaintiff of being in insolvent circumstances, and stating special damage, but without setting out the words, is ill, and if it be joined with other counts, which set out the words, and a general verdict given, the Court will arrest the judgment.

SLANDER. The plaintiff declares that whereas before and at the time of speaking and publishing the defamatory words by the defendant as hereinafter mentioned, he (the plaintiff) carried on the business of a baker, and had not been suspected to be insolvent, or unable to pay his just debts, or likely to become a bankrupt, per quod he had obtained the good opinion of his neighbours, &c., and was daily and honestly acquiring in the way of his trade great gains, yet the defendant, well knowing, &c. in a certain discourse which the defendant had with the plaintiff, in the presence and hearing of divers subjects, falsely and maliciously spoke and published to, and of, and concerning the plaintiff, in the way of his trade and business, these false, &c. words, "You owe several millers money, and they are at your house every day for money, and you are not worth a penny."—Second count; for speaking these words: "You are not worth a penny."—Third count; that the defendant, in a certain other discourse, &c. in the presence and hearing of the said last-mentioned subjects, falsely and maliciously charged, and asserted, and accused the plaintiff of being in bad and insolvent circumstances. By means of committing which said grievances by the defendant, the plaintiff hath been greatly injured in his trade and business, and divers subjects, to whom the solvency and good circumstances of the plaintiff were unknown, have suspected the plaintiff to be insolvent, and unable to pay his just debts, and likely to be a bankrupt, and have refused to have any trans-
action.

action in the way of business, or otherwise, with the plaintiff, and in particular one of the said subjects, to wit, *R. P.*, who used to sell and deliver to the plaintiff goods in the way of his trade, hath, ever since the committing of the said grievances by the defendant, wholly refused, and still doth refuse to deliver any goods to the plaintiff on credit, and for want of such goods the plaintiff hath been injured in the way of his trade, &c. Plea not guilty.

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After a general verdict for the plaintiff upon all the counts, with 40s. damages, at the last assizes for *Devon*, it was moved in *Easter* term, by *Gaselee*, in arrest of judgment, that the words ought to have been set forth in the last count, and that for this defect the count was too general, and uncertain.

Gifford, on a former day in this term, shewed cause, and cited 1 *Ventr.* 264. *Anon.* (a), *Com. Dig. Action upon the Case for Defamation*, (D. 4.) and the language of Lord *Hardwicke* in *Nelson v. Dixie* (b), in support of this general mode of declaring. And he further contended, that supposing this would have been bad upon demurrer, yet here it was cured by the verdict; and he referred to Serjt. *Williams's* note, 1 *Saund.* 228., for the rule "that where there is any omission in pleading which would have been fatal on demurrer, if the issue joined be such as necessarily required on the trial proof of the facts so omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such omission is cured by the verdict by the common law." Also *Com. Dig. Action on the Case for*

(a) See also 1 *Shew.* 282.(b) *Cas. temp. Hardw.* 305.

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Defamation, (D. 30.) "Any words by which the party has a special damage are actionable." And here the plaintiff has alleged a special damage; and after verdict it must be taken that such damage was proved, and that it was also proved that the defendant spoke words which amounted to a charge of insolvency, for so in substance the declaration alleges; and unless that had been proved it is not to be presumed that either the judge would have directed, or the jury would have found the verdict. Thus in *Ward v. Harris* (a) the generality of the declaration was held to be cured by the verdict; but otherwise in *Andrews v. Whitehead* (b), where objection was taken on special demurrer.

Pell Serjt. and *Gaselee*, contra, argued that the declaration ought to have laid the particular words spoken (c), and that for this defect the Court after verdict would arrest the judgment. And for a like defect in *Hale v. Cranfield* (d), after verdict, judgment having been entered for the plaintiff without the privity of the Court, the Court commanded that the roll should be amended. Also in *Newton v. Stubbs* (e), which was since the stat. of jeofails, 16 & 17 Car. 2. c. 8., the words being laid ad effectum sequentem, the Court for that very reason after verdict stayed the judgment. And though the report in *Show.* adds a quære, yet it appears that it was moved afterwards, and again judgment given for the defendant.

Cur. adv. vult.

(a) 2 B. & P. 265.

(b) 13 East, 102.

(c) *Com. Dig. Action on the Case for Defamation*, (G. 6.)

(d) *Cro. Eliz.* 645.

(e) 2 *Show.* 435. S. C. 3 *Mod.* 71.

Lord

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This is an action of slander, which was tried at the next assizes for the county of *Devon*. On not guilty pleaded, a general verdict was found for the plaintiff on all the counts of the declaration, with 40s. damages. A motion has been made in arrest of judgment, on an objection to the last count, as to which the declaration is as follows: the plaintiff states himself to be a baker, never to have been suspected of insolvency, and to have carried on his business with profit; that the defendant contrived to injure him, and to make it be believed that he was in bad and insolvent circumstances, and unable to pay his just debts, in a certain discourse which he held in the presence and hearing of certain subjects, at the time and place mentioned in the declaration, in the presence and hearing of the same subjects, falsely and maliciously charged and asserted, and accused the said plaintiff of then and there being in bad and insolvent circumstances, by which the plaintiff is injured in his said business, has sustained loss generally, and has also lost one customer particularly named. The objection is, that in a count for slander by words, the words themselves should be set out, in order that the defendant may know the certainty of the charge, and may be able to shape his defence, either on the general issue, or by plea of justification accordingly, and that this defect is not cured by verdict. On the other hand, it is said that this is no great inconvenience to the defendant, as he might certainly have demurred to the declaration with success; but it is contended, that this defect is cured by the verdict; that the charge of having spoken words injuring the plaintiff in his trade is

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well laid in substance, and though the particular words are not set out, yet it must be presumed, after verdict, that such words or acts were proved, as if specially alleged, would have supported that charge; otherwise the verdict could not have passed for the plaintiff. The first thing to consider, is what the allegation is, and by what evidence it might have been proved. The complaint is, that in a discourse held in the hearing of many, the defendant *charged and asserted and accused* the said plaintiff of being in bad and insolvent circumstances. The insertion of the word "asserted" is not very grammatical. This charge might certainly have been proved by evidence of words only, but if the words had not been actionable in their ordinary import, but only by reference to some act or gesticulation, such as holding up an empty purse, or the like, it would have been open to the plaintiff to have maintained this allegation, made in such terms, by evidence of acts giving a slanderous meaning to words, which in themselves might import no slander. If the allegation had been, that he charged and accused the plaintiff of insolvency by word or act, the count would undoubtedly have been bad; and yet the same answer would apply, that one of the alternatives must have been proved, or the verdict could not have passed for the plaintiff, and that either mode of slander is actionable. As this count is expressed, it could not have been proved by evidence of a slander by acts alone, not accompanied with words; but it might have been proved either by words alone, or by words coupled with acts. The allegation then amounts to this, that the defendant by words, or by words coupled with acts, slandered the plaintiff in his trade; and therefore it is bad; and not cured by verdict, as a charge in the

alternative. But supposing it to be taken as a charge of oral slander only, the weight of *authorities is against the setting out words by their effect only.* This count is equivalent to an allegation that the defendant used certain words to the effect of imputing insolvency to the plaintiff. The case of *Newton v. Stubbs*, 2 *Show.* 435., which was moved twice, and was settled after much debate, is an express authority that a count for using words to the *effect following*, &c. is bad after verdict: the Court there admit that it must be taken for granted that the defendant “spoke the sense of the words mentioned in the declaration,” which, as no words were there set out, must mean that he spoke words to the sense and effect mentioned in the declaration. This case was decided since the stat. of *Car.* 2., though this does not seem to be a case within that statute. This doctrine is very much confirmed by the case of *Zenobio v. Artell*, 6 *T. R.* 162., which was an action for a libel written in the *French* language, and “which said libel is according to the purport and effect following, in the *English* language, that is to say,” &c.: after judgment by default, the judgment was arrested on the objection that the paper, as written in the *French* language, should have been set out; Lord *Kenyon* says, “that this objection must prevail is evident from the uniform current of precedents, in all of which the original is set forth;” and the judgment was arrested. It is true, that that was a case where the judgment was by default, and there are some cases where a defect is cured by a verdict, which is fatal on such a judgment; but that was not one of those defects: no evidence before the jury could have operated so as to supply the want of the allegation of the words in the original language. This case

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also furnishes another objection to the count in the present case, that the allegation, as expressed in the count, might have been maintained by the proof of words in any language. Ten judges in Dr. *Sacheverell's* case, 5 *State Trials*, 828. delivered an unanimous opinion (no others being present) that "by the law of *England* and constant practice, in all prosecutions by indictment or information, for crimes or misdemeanors by writing or speaking, the particular words, supposed to be criminal, ought to be expressly specified in the indictment, or information." There seems to be no reason for any difference in this respect between civil and criminal cases, the action arises *ex delicto*. The words supposed to be used by Lord *Hardwicke* in *Nelson v. Dixie*, *Cas. temp. Hardw.* 305., were merely thrown out at *nisi prius*, and not material to the point ruled by him in that cause; and they are evidently founded on a mistake, as there are no such precedents in *Rastall* as he supposes. Unless the very words are set out, by which the charge is conveyed, it is almost, if not entirely impossible to plead a recovery in one action in bar of a subsequent action for the same cause. Identity may be predicated with certainty of words, but not of the effect of them as produced upon the mind of a hearer. It has been said, that this is not like the case of a defective title, but is more analogous to that of a title defectively set out. If, however, the authorities cited are law, and they are supported by more ancient ones, it is of the substance of a charge for slander by words that the words themselves should be set out with sufficient inuendoes, and a sufficient explanation if required to make them intelligible: it is of the substance of a charge of slander of any sort that

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it should not be laid in the alternative. Upon the whole, we think that this count is so defective in substance, that no intendment can be made, to supply its defects, from what can be presumed to have passed at the trial; and consequently that the judgment must be arrested.

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WILKINSON, Assignee of HAFFENDEN and NEWCOMB, Bankrupts, *against* LOUDONSACK.

Monday
June 27th.

CASE against the defendant, as surviving partner of *Scarratt*, deceased, for not safely stowing and conveying on board their ship from *London* to *Buenos Ayres*, and there delivering a bale of blankets, &c. (a) Plea, general issue. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Hilary* term 1813, a verdict was found for the plaintiff, and a rule nisi for a new trial was obtained in the ensuing term, upon an objection taken at the trial to the legality of the voyage; and the Court in *Trinity* term, when the rule came on to be argued, directed it to stand over, and the objection to be stated in a special case, the material facts of which are as follows:

The defendant and *Scarratt* were joint owners of the Ship *Elliott* in the year 1806, and the bale of blankets was shipped on board her by the bankrupts on

The stat. 47 G. 3. sess. 1. c. 23. which repeals so much of the stat. of *Anne* as vests in the *South Sea Company* the exclusive privilege of trading to parts within certain limits, extends only to such places within those limits as were at the time of passing the act, or at any time since, in the possession or under the dominion of his majesty; and therefore an action was held not to lie against the defendant for not safely stow-

ing and conveying goods of the plaintiff from *London* to *Buenos Ayres*, which place was captured by his majesty's forces, but afterwards recaptured before the passing of the act, and the shipment of the goods: although the goods were shipped under the sanction of an order in council purporting to authorize the voyage, and the recapture was unknown when the goods were shipped, and the voyage commenced.

(a) See the declaration more fully stated in the judgment of the Court.

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the 26th of *October* 1806 to be carried from *London* to *Buenos Ayres*; at which time the freight of the said goods for that voyage was paid by the bankrupts to the broker of the defendant and his partner. The ship sailed on the voyage shortly afterwards. *Buenos Ayres*, which had been captured by the *British* forces, and remained in their possession for a short time, was recaptured by the *Spaniards* in *August* 1806, but that fact was not known in *England* at the time of the shipment of the goods, and commencement of the voyage. In consequence of this recapture, when the ship arrived out, she was obliged to put into *Monte Video*; and there the goods were delivered to the bankrupts, having been damaged in the voyage as stated in the declaration. No licence had been obtained from the *South Sea Company* either for the ship or for any part of her cargo on that voyage. It was agreed that his majesty's order in council dated the 17th of *September* 1806, purporting to legalize the trade to *Buenos Ayres*, should be read as part of the case by either party (a). The question for the

(a) The order in council recited that the capital town and fortress of *Buenos Ayres* and its dependencies had been conquered by his majesty's forces, and the territories and forts of the same were delivered up to and were then in his majesty's possession; and it was thereby ordered and declared that all his subjects might lawfully trade to and from the said capital town and fortress and its dependencies, including therein all and every the territories belonging to or forming part of the government of the same, in *British* ships, owned by his majesty's subjects, and navigated according to law, or in ships bona fide belonging to any of the subjects or native inhabitants of the said town, or territory, such native inhabitants being peaceable residents within the same, and under the obedience of his majesty's government there, and that such trade should be subject to the same duties, &c. to which the trade to and from his majesty's colonies in the *West Indies* and *South America* was or should be subject by law, except as thereafter specified, and that all commodities being of the growth, produce, or manufacture of the said capital town and fortress and its dependencies, including therein all and every the territories belonging to or forming a part of the government of the same, or which

had

tion of the Court is whether the plaintiffs are to recover.

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er argued for the plaintiff on a former day, and that the order in council did not dispense with violations of *stat. 9 Ann. c. 21.* for vesting the ex-trade within certain limits in the *South Sea* Company, supposing those provisions were still in force.

contended that they were repealed by *stat. 1. sess. 1, c. 23.* inasmuch as by the general words of the statute, "all penalties and forfeitures by the act declared and enacted, for securing the powers of the *South Sea* Company for carrying on the trade and for preventing the subjects from carrying it on" were repealed from the 17th of September 1806. It

that it appears by the case, that *Buenos Ayres* was captured before the passing of that statute, and that at the time of its passing, nor at any time since, was it in the possession or under the dominion of his majesty, and that the statute purports to be made only in respect of such places as then or at any future time should be in the possession of his majesty; but the general words of the enactment are enough to comprehend this case, and it is that the object of the legislature was to adopt and confirm the order in council, which had issued during

any goods usually exported therefrom, should be permitted to be imported into any part of the United Kingdom, in *British* ships, owned by his majesty's subjects, and navigated according to law, or in ships belonging to any of the said subjects or native inhabitants of any town or territory, and that such commodities should be subject to the same duties, &c. as articles of the like sort are subject to when exported from his majesty's colonies in the *West Indies* or *South*

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the recess of parliament immediately preceding; and therefore it refers back to the date of the order in council, and opens the trade from that date. And though it should be held that the act, by reason of the restrictive words applies only to places at the time of the act's passing, or since, in the possession of his majesty, still the plaintiff may well recover in this action; because his contract was not made in wilful contravention of an act of parliament, but under the supposed validity of the order in council. And therefore this case differs from *Toulmin v. Anderson (a)*, for there the goods having been shipped, and the policy effected, before the date of the order in council, there was no pretence for saying that the trade was legalized in any degree before that date, but the voyage was directly in contravention of the act of *Anne*; whereas here both parties acted upon the faith of an order in council, which order was issued upon the faith of its being afterwards made good by an act of parliament; and in a case which is to be determined upon the general policy of the law, it becomes a material consideration whether what has been done is *bonâ fide* or not. Again, this case differs from *Toulmin v. Anderson*, because that being an action upon a policy of assurance, the voyage itself and its legality came directly in question; for the action was to enforce a contract for the performance of the voyage; but here the action is for a collateral damage, arising it is true during the voyage, but not out of its non-performance, but out of the misfeasance of the party who has contracted to do a collateral thing; and the contract is executed by the payment of the freight,

(a) 1 *Tampt*, 227.

and

and the delivery of the goods at a lawful place of destination; and the intended destination having been frustrated by events out of the control of the parties, a legal voyage has been substituted. Therefore the defendant, who has received the benefit of his contract shall not be permitted to cover his own misfeasance, which was collateral to the voyage, by averring the illegality of the voyage.

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Puller, contra, denied that the action was founded on a contract collateral to the voyage, maintaining that it arose out of the voyage itself, which was admitted to be illegal. And he chiefly relied on *Toulmin v. Anderson*, and cited *Lightfoot v. Tenant* (a), for the principles there adopted, and laid down by *Eyre C. J.*; and urged that the general policy of the law ought to prevail over the particular hardship. He also cited *Edgar v. Fowler* (b), and *Law v. Hodson*. (c)

Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This was an action on the case, in which the plaintiff declared that *Haffenden* and *Newcomb*, the bankrupts, before their bankruptcy, had delivered to the defendant *Loudonsack* and his partner, since deceased, a bale of blankets, to be by them safely and securely packed, stowed, carried, and conveyed in their ship from *London* to *Buenos Ayres* in *South America*, and there safely delivered to the bankrupts for reward to be therefore paid: that the defendants had and received the goods for that purpose, yet

(a) 1 B. & P. 551.

(b) 3 East, 222.

(c) 11 East, 300.

not

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not regarding their duty in that behalf they did not safely and securely pack, stow, carry, and convey the goods in the ship from *London* to *Buenos Ayres*, nor there safely deliver them to the bankrupts; but so carelessly and improperly conducted themselves, that through their negligence and improper conduct the goods were afterwards, and during the voyage, perforated and torn by iron bolts, and otherwise damaged and spoiled. The defendant pleaded not guilty. And at the trial at Guildhall, a verdict was found for the plaintiff for $\$6l. 7s. 10d.$, subject to the opinion of the Court on a special case. (Here his Lordship stated the case.) The question reserved by this case for the opinion of the Court, whether the plaintiffs are entitled to recover in this action, depends on this, whether the contract to carry the goods on the voyage stated in the declaration be or be not legal; for the injury complained of, in not packing, stowing, and carrying safely, or in carelessly and negligently packing, stowing, and carrying the goods, arises out of the contract for carrying, and depends on that contract; so that if the contract to carry the goods be illegal, no action bottomed in that contract, and arising out of a non-performance, or ill-performance of that contract, can be sustained. The contract is to carry goods from *London* to *Buenos Ayres*. The objection to it is, that *Buenos Ayres* is within the limits described in the act of 9 *Ann. c. 21. ss. 46, 47, 48, and 49.*, within which limits the sole trade is, by that act, secured to the *South Sea Company*, and to such persons as they shall authorize by their licence to trade thither: and it is stated in the case that no licence had been obtained from the *South Sea Company* for this ship or these goods. No prohibition can be stronger
against

against freighting or fitting out any ship or vessel, or lading or putting on board any goods or merchandizes with intent to trade at any places within those limits: the question therefore on this part of the case is reduced to the point whether this trade is made legal by the statute 47 G. 3. sess. 1. c. 23. The order in council of 17th September 1806, referred to in the case, is not contended to be of force to dispense with the prohibition contained in the stat. of *Anne*; and to be sure it could not for an instant be so contended, and was therefore very properly abandoned at the outset of the argument: it can only be called in aid of the construction of the stat. 47 G. 3. That act recites the stat. 9 *Ann.*, and that it was become highly expedient for the general commerce of all his majesty's subjects, and for the encouragement and security thereof, that the *South Sea Company* should not be deemed to be entitled to the sole trade, *whenever any of the places within the limits should be acquired by, or come into the possession, or be under the dominion or protection of his majesty*, his heirs and successors; it therefore enacts, "that so much of the stat. of *Anne* as vests, or may be deemed to have vested, in the *South Sea Company* the exclusive privilege of trade, to those parts within the limits prescribed by the stat. of *Anne*, *which now are, or at any time hereafter shall or may be belonging to*, or in the possession, or under the dominion or protection of his majesty, his heirs and successors, and all powers, rights, and privileges to the said *South Sea Company* by the said act given and created, for carrying on such trade, *and all penalties and forfeitures by the said act declared and enacted for securing the same*, and for preventing his majesty's subjects from carrying on trade contrary to the pro-

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provisions of the said act, shall be and the same is hereby declared to be absolutely repealed, and shall be deemed and taken to have ceased and determined from and after the 17th September 1806, to all intents, constructions, and purposes whatsoever." The recital of this act explains the intention of the legislature, viz. to take away from the *South Sea Company* the sole trade within the limits defined by the stat. of *Anne*, whenever any of the places within those limits should be acquired by, or come into the possession, or under the dominion or protection of his majesty; and the enacting part pursues that intent disclosed by the preamble, for it enacts that so much of the stat. of *Anne* as vests in the *South Sea Company* the exclusive privilege of trade to those parts within the limits *which now are* or at any time hereafter shall or may be belonging to, or in the possession, and under the dominion of his majesty, and all powers and privileges granted to the Company for carrying on such trade, and all penalties and forfeitures for securing the same, and for preventing his majesty's subjects from carrying on trade contrary to the provisions of that stat., shall be absolutely repealed. So far there is nothing in the enactment of the statute extending the preamble or contrary to it: but it has been contended that the latter words of the clause, viz. "and shall be deemed and taken to have ceased and determined from and after the 17th September 1806, to all intents, constructions, and purposes whatsoever," carry the repeal of the stat. of *Anne* beyond the intent, as expressed in the preamble, and legalize the trade, not only to such places within the limits as at the time of passing the act, or at any time after, were or should be in the possession or under the dominion of his majesty,

but

but to all places which before the passing of the act were so, or at least legalize every act of trade in contravention of this stat. of *Anne*, done from and after the 17th September 1806. But to this construction of the latter words of the act of 47 Geo. 3. we cannot, upon consideration, feel ourselves warranted in acceding. The date of 17th September inserted in the act, being the date of the order in council legalizing the trade to *Buenos Ayres*, may induce a suspicion that the legislature meant to effect that which the order in council of that date professed to do, but which it was incompetent to do; but we are unable to find sufficient words to carry it to that extent; and indeed unless the latter words of the clause are understood with reference to the places which now are or hereafter shall or may be in possession and under the dominion of his majesty, they cannot stop short of a total repeal of the statute of *Anne* as to all places whatsoever, and must take away entirely the exclusive trade of the *South Sea Company* throughout the whole limits described in that stat.: a construction which would require more plain and precise words to authorize than this act contains. Taking it therefore that the restrictions imposed by the stat. of *Anne* on the trade to *Buenos Ayres* are not relaxed by the order in council, nor by the act of the 47th of the king, except as to such places as at the time of passing that act were, or at any time since have been in our possession, and that at the time of the shipment of these goods, and commencement and continuance of this voyage, *Buenos Ayres* was not in our possession, there seems to be no ground on which to rest the plaintiff's right to recover. The duty on the part of the defendant to carry safely cannot possibly be de-

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tached or separated from the contract to carry the goods on the voyage: the voyage is prohibited by law, and any contract to perform that voyage is of course impliedly and by consequence prohibited, and no duty can arise out of a contract so prohibited. The freight for the carriage of the goods has been paid; but if the consideration for such freight is illegal, the performance of it cannot be enforced, for that would tend to encourage, rather than to defeat, every infringement of the law: it is like a premium of insurance paid on an illegal voyage, which cannot authorize the assured to call on the underwriter to perform his part of such contract; or like a price paid for the smuggling prohibited goods into the country, which can never be made the foundation of an action, either for not bringing the goods at all, or not bringing them in a perfect undeteriorated state. The only remaining argument in favour of the plaintiff was, that here had been no *wilful* contravention of the law; both parties thought they were acting legally: but their misapprehension of the fact, or the law, cannot alter the character of the contract, which the Court is called upon by this action to enforce. This in substance cannot be distinguished from the case of *Toulmin v. Anderson*, 1 *Taunt.* 227.; though in circumstances some difference may be found, the legal result is the same. With every inclination to sustain the claim of the plaintiff, if by law we had been sanctioned in so doing, we cannot discover any legal ground on which his case can be satisfactorily placed. The consequence is that the rule to shew cause why a nonsuit should not be entered, and which was enlarged in order to bring the question before the Court in the form of a case, must now be made absolute, and a nonsuit entered.

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The KING against The Justices of GLOUCESTER-SHIRE.

Monday,
June 27th.

RULE for a mandamus to the justices of *Gloucestershire*, to cause continuances to be entered to their next general quarter sessions, upon the appeal of *R. Knight*, vicar of *Tewkesbury*, against an order of the commissioners acting under the 51 G. 3. c. 61. (local and personal, not printed,) for inclosing lands in the hamlet of *Fiddington*, &c.

The affidavit in support of the rule stated that *Knight*, as vicar of *Tewkesbury*, was entitled to the corn tithes arising out of the lands within the hamlet of *Fiddington*; that by the said act the commissioners were authorized and required to set out and allot to *Knight* (inter alios) in lieu of his said tithes, such parts of the lands intended to be divided and allotted as in their judgment should not be of less value than one-fifth of the arable, &c. And it is also enacted, that if any person or persons shall think themselves aggrieved by any thing done in pursuance of this act, they may appeal to any general quarter sessions which shall be held for the county of *Gloucester*, within six calendar months after such cause of complaint shall have arisen. The commissioners made their allotments, and, among others, allotted to *Knight* certain parcels of land in lieu of his said tithes, and in pursuance of the 41 G. 3. c. 109. s. 14. (the general inclosure act) gave notice in writing, affixed to the church door, dated the 22d of Nov. 1813, that

By 51 G. 3. c. 61. (inclosure act) the party aggrieved by any thing done in pursuance of the act may appeal to the quarter sessions within six calendar months after the cause of complaint. The commissioners in 1812, made an allotment, upon the map to the vicar in lieu of his tithes, which the vicar inspected at a meeting held November 1812, and appointed an agent, who attended a subsequent meeting, when an alteration was made in the map, which the agent approved, and it was understood that all objections to the vicar's allotments were reconciled; in November 1813 the commissioners gave notice that they had ordered all tithes, &c. to cease from the 29th of September then last:

Held that the vicar was not out of time to appeal to the next quarter sessions after that notice.

they

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they had ordered and directed that all tithes, both great and small, moduses and other payments in lieu thereof, should cease and determine, and be for ever extinguished from and after the 29th of *September* then last, from which day they had made their allotments. *Knight* being dissatisfied with the allotments, entered his appeal at the *Epiphany* sessions 1814 (being within six months of the date of the above notice) against the orders of the commissioners, and the allotments made to him; which appeal came on at the following *Easter* sessions, and was dismissed on the ground that it was not made in time.

The affidavits against the rule disclosed a variety of meetings held by the commissioners in 1812 for the purpose of receiving the claims, taking the preparatory measures for making the allotments, and hearing the objections of the several proprietors; at one of which *Knight* made his claim, and afterwards in *November* of the same year attended and inspected his allotment on the map, and appointed one *Sandilands* his agent in the business, requesting that all matters might be referred to him. *Sandilands* afterwards, on the 18th Nov. 1812, attended, when some alteration was made in the map, which he approved, and accepted the allotments on behalf of *Knight*, declaring that the alteration would be beneficial to him; and it was fully understood that all objections to his allotments were reconciled and finally arranged at that meeting, and that possession of all the allotments was to take place from the 29th of *September* preceding; from which day the payment of all tithes was to cease. Both *Knight*, and *Sandilands* on his behalf, afterwards offered to let the said allotments to several persons; and in one instance it appeared that *Sandilands*

offered them from *Michaelmas* 1814. The affidavits also stated that the hearing of the appeal against the order of the commissioners, at the *Easter* sessions, occupied nearly two whole days; and that the justices dismissed the appeal, being of opinion that the cause of complaint of *Knight*, if any, arose upon the setting out and arranging the allotments in *Nov.* 1812, and not from the notice of extinguishment of tithes delivered to him in *September* 1813.

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The Attorney-General and *Campbell*, who shewed cause against the rule, contended that the appellant came too late with his appeal, inasmuch as the time for making it was within six months after *November* 1812, when his allotment was set out. The cause of complaint was the having an insufficient allotment; for if the allotment had been sufficient, the ceasing of the tithes would not have been any grievance; and therefore though in form the appeal assumed the colour of being an appeal against the notice given by the commissioners for the ceasing of the tithes, yet in substance the only question was upon the sufficiency of the allotment. But there was a proper time for agitating that question, viz. within six months from *Nov.* 1812, when the allotment was finally arranged. In *Rex v. Justices of Wilts (a)*, upon a similar question, the Court held that the time for appealing began to run from the period when the allotment to be made to the party was arranged, without waiting for the final award of the commissioners.

Abbott and *Richardson* contra, insisted that nothing final as to the allotments took place in 1812, nor does

(a) 13 East, 352.

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it appear, as in *Rex v. Justices of Wilts* it did, that the appellant or any other of the proprietors took possession of their allotments at that time, although it is stated that it was understood that possession was to be taken, and the payment of tithes to cease, from the *Michaelmas* preceding. But that is quite inconsistent with the subsequent notice of the commissioners that the tithes were to cease from *Michaelmas* 1813. The notice therefore shews that what was done in 1812 was not considered as binding, and unless something conclusive upon all parties then took place, the appellant cannot be concluded by it.

LORD ELLENBOROUGH C. J. What final circumstance is there in the transactions of 1812 to make the allotment conclusive upon the parties? The allotment to this appellant was not per se a grievance; nor did it necessarily become so, until there was a ceasing of the tithes. But the moment it was coupled with a determination of the appellant's right to tithes, then if the allotment was an insufficient compensation for the benefit which he before enjoyed, and was to relinquish, it became a grievance and cause of complaint.

DAMPIER J. By the notice of the commissioners the tithes are to cease from the 29th of *September* 1813, and then only the vicar can be aggrieved, and is to look to his allotment. Until the tithes ceased the vicar could not be aggrieved by the insufficiency of his allotment. And before that time nothing final seems to have been done by the commissioners.

Per Curiam,

Rule absolute.

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BLANCHARD *against* BRAMBLE.*Monday,*
June 27th.

ASSUMPSIT for goods sold and delivered. The action was commenced against the defendant, and others, one of whom was churchwarden and the other overseer of *Kingston, Dorset*, for the price of sundry parcels of bread, the greater part of which was delivered to the parish officers by their order, and one parcel was delivered to them by the order of *Bramble*, acting on their behalf, and the bread was for the use of the poor of the parish. The plaintiff declared against *Bramble* only, and judgment, as in case of a nonsuit for not proceeding to trial, was given against him. A rule nisi was obtained that the latter might tax double costs under the stats. 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12.

Parish officers, or persons acting on their behalf, are not entitled, under stats. 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12. to double costs upon judgment as in case of a nonsuit in an action brought against them for the price of goods sold and delivered to them for the use of the poor.

Barrrough shewed cause, and relied upon *Atkins v. Barwell* (a) to shew that the statutes 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12., giving double costs to churchwardens and overseers, and persons acting in their aid, do not extend to actions brought against them for a non-payment, such as the non-payment of money in this case. The statutes relate only to actions for a misfeasance, for they use the words "for any matter or thing done" and "shall do any thing;" whereas the non-payment of the price of a thing is merely omitting to do it.

W. P. Taunton, contra, endeavoured to distinguish the case from *Atkins v. Barwell*, because that was an

(a) 3 East. 92.

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action for money paid to the use of the defendants as parish officers without their privity, and without their being at all concerned in the transaction, and therefore could not be said to be for or concerning any matter or thing done by them. But here the order for the bread and the purchasing and distributing it to the poor was an act done by the parish officers in the execution of their office, and by the defendant in their aid and assistance. And it is no objection to the allowance of double costs that the form of the action is assumpsit, as it was admitted in *Atkins v. Barwell*. And in *Will v. Tydy (a)*, where the action was assumpsit for money received by the defendant as collector of the taxes, treble costs were allowed upon the stat. 1 Will. So, in *Okeley v. Salter (b)*, the action, which in the report is called trespass, must have been trespass on the case on promises, being brought to recover back money voluntarily paid, and there treble costs were given on the stat. 43 Eliz. c. 2. s. 19. Also *Egerton's case (c)* was assumpsit, and is cited and recognized as such in 1 Str. 50.

Lord ELLENBOROUGH C. J. observed that in the case last cited there was a wrongful receiving of the money in the first instance, which was an act done, and the action was brought upon that wrongful receiving; but here all was in the negative, for non-payment is not an act done, but an act forborne to be done.

BAYLEY J. The action is not brought for buying the bread, but for not paying for it, which is a mere non-feasance.

Per Curiam,

Rúle discharged.

(a) Carth. 188.

(b) Yelv. 176.

(c) Comb. 322.

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**The KING against The Commissioners of Ap-
peals in Matters of Excise.** *Tuesday,
June 28th.*

HOLCOMBE, a brewer in *Southwark*, was convicted, by three of the commissioners of excise, in a penalty of 200*l.* (mitigated to 180*l.*) upon an information exhibited against him by one *Collier*, for being the proprietor of a private still. Against that conviction he appealed to the commissioners of appeals, and upon the hearing of the appeal before three of them, tendered several witnesses, whom he proposed to swear and examine on his behalf, but who had not been examined on the original hearing before the commissioners of excise, and were therefore objected to as inadmissible by the respondent. Some of the witnesses, whom *Holcombe* so tendered and proposed to examine, were in confirmation of facts which had been sworn to and given in evidence on his behalf by a witness examined for him upon the original hearing; others were to contradict a part of the testimony given against him upon the original hearing; and others were to new or explanatory matter, or to that effect. The commissioners of appeals declined admitting any of these witnesses; and as it had long been a subject of controversy, whether any witness, who had not been examined before the commissioners of excise, was admissible before them, although the original witnesses might be examined before them to additional or subsequent matter, adjourned the appeal, in order to have the opinion of this Court.

Accordingly a rule nisi for a mandamus to the commissioners of appeals was obtained in last *Hilary* term,

The commissioners of appeals in matters of excise, cannot reject the testimony of witnesses tendered for the appellant, upon appeal to them against a conviction by the commissioners of excise, upon the ground that such witnesses were not examined at the original hearing.

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commanding them to proceed to the examination of the matter of fact mentioned in the conviction of *Holcombe*, and to swear and examine all competent witnesses to be produced on the hearing of his appeal against the said conviction. And upon the motion the case of *Breedon v. Gill* (a) was mentioned, and also the stat. 48 G. 3. c. 74. s. 15., which specially provides that upon appeals against convictions relating to malt, the same witnesses who have been before examined upon the original hearing, and no other, shall be re-examined; from which it was inferred that the legislature must have conceived that without such a negative provision other witnesses would not be excluded. And here no such provision is to be found in stat. 12 Car. 2. c. 24. s. 45., which gives this appeal.

The Attorney-General, Park, Dauncey, and Gaselee shewed cause in *Easter* term, and relied upon the long and almost uniform practice that had obtained, since the stat. 12 Car. 2. c. 24., to admit no other witnesses before the commissioners of appeals, than such as had been examined upon the original hearing. And they mentioned one instance in particular, in which the late *Mr. Rous* attended for the appellant, and though he expressed his indignation at the practice, he did not move the Court. They also argued from the nature of an appeal, which meant a reference to others of something which has been done before, and not of a matter entirely new, that the practice was consonant to reason, which limited the inquiry upon the appeal to such evidence as had before been given; and that although in

(a) 1 *Ld. Ray.* 219. S. C. *Salk.* 555. 3 *Mod.* 271,

some

some instances perhaps better lights might be afforded by admitting fresh evidence, yet such a practice would wholly alter the nature of this proceeding, and probably lead to a virtual destruction of the original jurisdiction of the commissioners of excise, because the trial before them would always be made a mere trial of form. And great hardship might also ensue to the prosecutor from such a practice, because by stat. 15 Car. 2. c. 11. s. 19. if upon appeal the original judgment shall be reversed, the prosecutor shall pay double costs; the consequence of which might be, that though the prosecutor might be well warranted in resisting the appeal upon the original case, yet before the commissioners of appeal the appellant might make a new case, and the prosecutor might find himself mulcted in double costs volens volens. And therefore, for avoiding these inconveniences, the proceeding upon this appeal shall be regulated in the same manner, as upon appeal to parliament from decrees of courts of equity, or the courts of Scotland, upon which no new evidence is admitted in the House of Lords on any account (a). And upon a writ of attaint, which is also analogous to this proceeding, because there if the verdict be found a false one the attainted jurors incur a forfeiture, he that brings the attaint can give no other evidence to the grand jury, than what was originally given to the petit (b). Also upon motions for new trials, the Courts decide whether a new trial shall be granted or not, upon the judge's report who tried the cause; and the reason why the sessions, upon appeal against orders of removal, are not confined to the evidence given before

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(a) See *Gilb. Equity Rep.* 155, 156.(b) See 3 *Bl. Comm.* 402.

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the removing justices is, because the order of removal is an ex parte proceeding and made upon ex parte evidence; and their practice of hearing new evidence upon appeals against convictions, where the same reason does not apply, is only to be accounted for by supposing that, for uniformity's sake, they assimilated the one to the other. And as to the case of *Breedon v. Gill*, it only decided that the commissioners of appeals ought not to proceed on the written examination of the witnesses before the commissioners of excise, but ought to hear those witnesses again vivâ voce; but not that they ought to hear new witnesses. And the 48 G. 3. c. 74. s. 15., so far from being introductory of a new practice, was passed for the purpose of removing doubts, and is declaratory of the ancient practice.

Marryat and *Lawes*, contrâ, argued that the witnesses tendered by the appellant before the commissioners of appeals, ought to have been received, although they were not examined upon the original hearing. And if the Court should hold to what has been said to be the practice, the consequence will be, that this clause of stat. 12 Car. 2. must be construed in two different ways, though it uses the same words, according to whether the appeal shall happen to be from a conviction before the chief commissioners, or from a conviction before the sub-commissioners, where the appeal is given to the quarter sessions; and certainly the sessions adopt a different practice. And this practice of the commissioners is probably of recent and not very familiar usage, for their jurisdiction lay dormant for some time, and was only revived about 30 years ago, when a new commission issued; since which time not more than between

20 and 30 appeals have come before them. But even upon their practice, it is admitted that they do allow the original witnesses to be examined to new matter; which is conceding all that is required, for if they may hear new matter, why may they not hear new witnesses? And as to the argument deduced from the nature of an appeal, it may be answered that no instance can be stated where a court of appellate jurisdiction upon matter of fact as well as law, is restrained to the same evidence as was given in the court below. The practice upon the granting of new trials is the reverse; if the party is admitted to a new trial, it is usually upon a case to be made de novo; and the discretion of the Court in granting the rule is so far from being confined to the facts upon the former trial, that they almost as frequently grant it upon affidavit, as upon the Judge's report. In the same manner, not only upon appeals against orders of removal, which are open to the observation made upon them, but in every case of appeal to the sessions, both parties are at liberty to examine all competent witnesses on their behalf, without regard to whether they have been examined before or not. And in *Breedon v. Gill* there could have been no reason for the Court's granting the rule for a prohibition, if they had thought that the commissioners of appeal could not go out of the original case, which appeared upon the depositions and written examination of the witnesses; but the Court held, upon the intent of the act, that the commissioners ought to examine the witnesses de novo: and one reason given was, because the first sentence might be by default; which clearly imports, that if it had been, the party might afterwards adopt a different course. And

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as to the proceedings upon appeal in the House of Lords, the reason is that they only sit as a court of error in law, and not upon the fact, and therefore cannot examine witnesses; but here the commissioners are expressly authorized and required to examine the matter of fact upon the oath of witnesses. The proceeding upon a writ of attaint is also diverso intuitu; for that lieth to inquire whether a jury has given a false verdict, and to punish them if found false; it would therefore be absurd to produce new evidence, and to condemn the former jury for not believing evidence which they never heard; but yet the jury, against whom the writ is brought, may produce new matter, in affirmance of their verdict (a), because they may have acted upon evidence of their own knowledge, which never appeared: so that there the restraint continues no longer than the reason of the thing requires. And as to the hardship likely to ensue to the prosecutor from allowing fresh evidence, because by the stat. 15 Car. 2. he will be liable to double costs in case the original judgment shall be reversed, the same objection applies to the awarding of costs in every case of appeal before the sessions; and in the present case it should be recollected that whatever hardship may arise from the practice, it is mutual, for in case of affirmance of the judgment the appellant is liable to the like costs. And if the hardship on one side, as it regards the costs, is to have weight, much more shall the hardship on the other side, where the party is mulcted, not only in the costs but in the penalty, which is the principal matter of the conviction. And suppose the appellant has been con-

(a) Finch. L. 486.

victed on the testimony of a witness, of whom if he had had notice, he would have been in a condition to prove him infamous and unworthy of belief; what injustice would follow unless this proof might be adduced upon the appeal. Therefore the Court will not, without positive words of the statute to prohibit the calling of new witnesses, give effect to an anomalous practice, if practice it can be called, merely upon a partial consideration of a supposed hardship.

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At the conclusion Lord ELLENBOROUGH C. J. observed that this was a case of grave importance, and had been argued with that industry and ability which it deserved. Some inconvenience would be likely to follow in either way of considering the case; on the one hand, it would be inconvenient that a party who had merits should be deprived of the opportunity of producing his proof; on the other hand, it would be a grievous inconvenience that a party who has brought forward the whole of his case, and regularly obtained a conviction, should be made liable for double costs upon the production of fresh evidence by the party convicted. The practice, which was stated to be of old time, and there was nothing to the contrary, was worthy of consideration; and certainly the provision in the malt-act seemed to be founded on a supposed analogy to some such existing practice under the excise laws. Under these circumstances, it would be rash to decide against the practice, except upon full consideration: however the argument had thrown difficulties in the way of it; for although only the same witnesses should be re-examined, yet if they were allowed to speak to other facts, that would be directly admitting fresh evidence;

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dence; and supposing they were confined, as far as might be, to the same facts, yet their re-examination would always, to a certain degree, be productive of fresh evidence, as it could not be supposed that any witnesses could give their testimony precisely in the same form and substance as upon a prior examination; and the malt-act forbids only the examination of other witnesses, but not their being examined to other facts.

Cur. adv. vult.

On this day Lord ELLENBOROUGH C. J. delivered the judgment of the Court in substance as follows:

This was a rule for a mandamus calling on the commissioners of appeal to hear a case, brought before them by way of appeal from the judgment of the commissioners of excise, de novo. The original as well as appellate jurisdiction is created and regulated by stat. 12 Car. 2. c. 24. s. 45., which enacts, "that all forfeitures and offences made and committed within the limits of the chief office in *London*, shall be heard, adjudged, and determined by the chief commissioners of excise, or the major part of them, or by the commissioners for appeals, or the major part of them, in case of appeal and not otherwise; and all forfeitures and offences made and committed within any other the counties, cities, towns, or places of the kingdom shall be heard and determined by two or more justices of the peace, and in case of their refusal, by the sub-commissioners, or major part of them; and the commissioners for appeals, and the chief commissioners of excise, and all justices of the peace, and sub-commissioners respectively, are authorized and strictly enjoined and required, to summon the party accused, and upon his appearance or contempt to proceed

proceed to the examination of the matter of fact, and upon due proof made thereof, either by the voluntary confession of the party, or by the oath of one or more credible witnesses, to give judgment or sentence according as in and by the act is ordained and directed, and to issue warrants under their hands for levying such forfeitures as by the act is imposed for any such offence, upon the goods and chattels of the offender, and to cause sale to be made of the said goods and chattels, if they shall not be redeemed within 14 days, rendering to the party the overplus, if any be, and for want of sufficient distress, to imprison the offender till satisfaction be made." There is no difference whatever marked out by this statute between the mode of proceeding upon the original hearing in the court below, or upon the review in the court of appeal; nor does the 15 Car. 2. c. 11. s. 19., which is the only other statute upon this subject, make any such difference. The 19th sect. enacts, "that no appeal in any cause of excise whatsoever shall be admitted, until the appellant shall have deposited the single duty in the hands of the commissioners, farmers, or sub-commissioners of excise, within whose jurisdiction or division the cause was originally heard and determined, and have given security to the commissioners of appeal, or justice of the peace respectively, where such cause is to be finally adjudged, for such forfeiture as upon such hearing and determination was adjudged against him, and that if upon the hearing and determining any such appeal the said original judgment shall happen to be reversed and made null, then the said commissioners, farmers, or sub-commissioners, in whose hands the said single duty was deposited, shall restore the same, or as much thereof

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thereof as shall be adjudged by the commissioners of appeals, or justices of the peace respectively, to the appellant, and the party originally prosecuting shall pay him the double costs; but in case the first judgment shall be affirmed, the party appellant shall pay the like costs to the commissioner or commissioners complained of." If the costs in case of reversal had been directed to be paid by the commissioners, instead of by the party prosecuting, there might be more colour for contending that they ought to be liable upon the hearing of the original evidence only. But no such argument applies to the case of the party who originally prosecuted, if he proceed erroneously. The party prosecuting was a volunteer, and might choose whether he would prosecute or not, and should have previously ascertained whether he ought to prosecute or not; but the commissioners were not volunteers, but could only proceed upon the evidence which was laid before them in maintenance of the charge; and therefore to mulct them, because upon another state of facts a different conclusion ought to be made, would be productive of unjust consequences. The case of *Bredon v. Gill*, 1 *Ld. Ray.* 219., 2 *Salk.* 555., 5 *Mod.* 271., is a decisive authority, that the commissioners of appeals ought to administer new oaths upon the appeal; because the act of parliament is express, and has given them power to administer oaths for the same purpose. And therefore a prohibition was granted quoad the admitting of the depositions taken in writing before the commissioners of excise. But it is said that though the examination of the witnesses ought to take place *de novo*, yet the same witnesses only ought to be heard, in conformity with the stat. 48 G. 3. c. 74. s. 15., which enacts,

enacts, that the same witnesses, and no other, who shall have been before examined at the original hearing, shall be re-examined upon the appeal. But that statute, though it makes the law in futuro, in the particular case, does not decide the law in other cases. In the absence, then, of any statute, rule, or authority, in favour of the practice, and upon the authority of *Breedon v. Gill* as to the construction and effect of the stat. 12 Car. 2. and the duty of the commissioners, I cannot think the generality of the practice can be allowed of itself to prevail against the reason of the thing, and sense of the statute as it is to be collected from the statute itself, and the declared exposition of it. Indeed upon the reason of the thing, evidence, if it be to be heard again from the mouths of the same witnesses, cannot be precisely the same; differences must necessarily arise from a varied recollection of the witnesses; and unless the minutes themselves are to be the sole evidence, there can be no security for the identity of testimony. Upon the whole, we think that the statute of Car. 2. requires that this mandamus should be granted. If any inconvenience is likely to result from this determination, the legislature must be applied to to remedy it.

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Tuesday,
June 28th.

QUIN *against* REYNOLDS.

The Court held that plaintiff might lodge a detainer against defendant, in custody upon mesne process, after his bail had justified, the defendant not having completed his discharge, but being still within the prison: and that he was not entitled to his discharge upon an affidavit that the sum for which the detainer was lodged, was due at the time of the first arrest.

G. MARRIOTT moved to discharge the defendant out of custody on filing common bail, upon the ground of his having been detained contrary to the rule of Court *Mich. term 15 Car. 2. s. 2. (a)*. He stated from an affidavit of the defendant that in the beginning of *June* the defendant was arrested by the plaintiff for 600*l.* money lent, and gave bail to the sheriff, and at the return of the writ put in bail, but the bail not justifying he rendered in discharge of his bail. On the 25th of *June* in the morning the bail justified; and between 11 and 12 o'clock the defendant received a rule of Court for his discharge, when he was informed by the marshal's clerk that a detainer at the suit of the plaintiff had been lodged against him for 325*0l.* sometime after 11 o'clock that morning. And it was sworn that the whole of the supposed debt was due at the time of the first arrest. Upon these facts he contended that the defendant was constructively delivered so soon as his bail had justified, and consequently was not liable to this detainer; and, 2dly, that it being sworn that the whole was due at the time of the first arrest, this was a second arrest for the same cause.

But Lord ELLENBOROUGH C. J. said, as to the last objection, that the Court would not determine that question upon affidavit. If the party has been causelessly

(a) Ordinum est quod si defendens legitime deliberetur ab arresto super aliquo process. idem defendens non iterum arrestabitur eodem tempore virtute alius processus ad sectam ejusdem querentis.

arrested a second time, when he ought to have been arrested only once, he may bring his action for maliciously holding him to bail. And upon the other point he said, the defendant could not be considered as delivered before he himself knew it.

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BAYLEY J. Is it not the practice, when the bail has justified, to have a rule for their allowance, and to serve it on the plaintiff(a), and then the party in custody obtains a rule for his discharge, and on filing common bail is entitled to his discharge? But though bail has been perfected, yet if the party wilfully remain within the walls of the prison, he is liable to a detainer.

DAMPIER J. The words of the rule are, "Legitime deliberetur ab arresto." Here he was not delivered: he was within the walls of the prison at the time when the detainer was lodged.

Per Curiam,

Rule refused.

(a) See 4 T. R. 493. 2 B. & P. 341.

CURTIS *against* POTTS.

Tuesday,
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DEBT. The plaintiff declares that disputes existed between him and the defendant, concerning certain sums of money due from the defendant to him for work and labour, &c. and that for quieting the said disputes they agreed to refer the same to arbitrators, who thereupon awarded that the defendant should pay 90*l.* 10*s.* to the plaintiff, when he should be thereto requested, of which the defendant had notice, and was

To debt on an award made by arbitrators upon a submission to them generally without any time, a plea that the arbitrators did not make any award within a reasonable time, adjudged ill.

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then and there requested, &c.; 2d count, that the arbitrators awarded that the defendant should pay the same sum within a reasonable time, and avers that a reasonable time had long since elapsed. Plea, nil debet: 2dly, that the arbitrators did not make any award: 3dly, that they did not make any award within a reasonable time: and the two last pleas concluded with a verification. Demurrer to the 2d and 3d pleas assigning for cause (*inter alia*) that they concluded with a verification instead of to the country; and also to the 3d plea that no request to the arbitrators, or any refusal by them, to make their award on the matters in the counts mentioned, or either of them, at an earlier time, is alleged in such plea.

Joinder.

Marryat, in support of the demurrer, did not insist upon the objection that the defendant ought to have concluded his pleas to the country (*a*). But upon the other point he contended, that here, no time being limited to the arbitrators for making their award, they had an indefinite time. As if a power be given to *A.* generally, *A.* has his whole life to execute it at his will and pleasure; and though the party giving the power may request him to execute it within a reasonable time, and if he neglect, may revoke it, yet if he do not request, and *A.* execute the power, he cannot afterwards object that *A.* did not do it within a reasonable time. And in *Newgate v. Degelder* (*b*) the submission to arbi-

(*a*) See *vide* *Cooke v. Whorwood*, 2 *Saund.* 337.; and *semb.* that though since stat. 4 *Ann.* c. 16. it is matter of form only, it may be specially shewn for cause of demurrer. 2 *Williams's Saund.* 190. n. 5.

(*b*) 2 *Keb.* 10. 20. 24.

trators

trators was *when their occasions would permit*; and it was on those particular words that three of the Judges held that only a convenient time was intended to be given; but *contrà per Windham*, and that the arbitrators had during their lives.

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Curwood, *contrà*, argued that where no time is specified for the arbitrators to make their award, it must be intended that it is to be made within a reasonable time; in the same manner as where the law requires an act to be done, it must be done within a reasonable time. And what shall be a reasonable time is a question for the Court (a). And in *Newgate v. Degelder* the submission to the arbitrators when their occasions would permit, was considered as more extensive than if it had been, as here, generally without any time; yet there three Judges agreed that it was to be restrained to a reasonable time; and *Windham*, who disagreed, yet admitted that if it had been generally without any time, the law would have implied that it should be done in convenient time.

LORD ELLENBOROUGH C. J. There is no necessity in such a case as this for resorting to any implication that the award should be made within a reasonable time, because it was open to the parties to this agreement to have requested the arbitrators to proceed within a reasonable time; and if after such request the arbitrators had neglected or refused, they might have revoked their authority.

(a) *Com. Dig. Temps. (D)*.

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BAYLEY J. The reason of the thing seems to be that upon a general submission, the party may make his request, and if the arbitrator does not proceed, may revoke the authority.

Per Curiam,

Judgment for the Plaintiff.

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June 28th.

WARE *against* BOYDELL.

In a declaration on a promissory note, with the common counts, it is enough to allege a county for a venue, without a parish.

DECLARATION on a promissory note, and for work and labour, and on the money counts; and the venue in the margin was *London*, and throughout all the counts *at London aforesaid* only, without the usual venue *at the parish of St. Mary-le-Bow in the ward of Cheap*, or any other parish. Demurrer, assigning for cause, that it is not alleged in what place or parish in *London* the several supposed causes of action in the declaration mentioned, or any or either of them, accrued.

Joinder.

Puller, in support of the demurrer, admitted that since the statute (a) which provides for the awarding of venires out of the body of the county, the objection was one of form rather than substance; yet he urged that it had been usual in pleading, ever since the statute, not to omit specifying the vill or parish, as well as the county; and though this be an omission of form only, it may be specially shewn for cause of demurrer. And in *Emery v. Fell* (b) the answer given by the Court to the objection that there should be a venue shewing the place

(a) 4 Ann. c. 16. s. 6.

(b) 2 T. R. 28.

where

where the contract was made, was not that a venue was unnecessary, but that it was sufficiently laid; and *Buller J.* said that the venue is added for form's sake. And the decision in *Neale v. De Garay (a)* applies only to pleas in abatement. In *Ilderton v. Ilderton (b)* it was said by *Eyre C. J.* that of such matters as arise in a foreign country, and are merely transitory, the Courts acquire a jurisdiction by the help of the fiction of a parish, and that they could not proceed without it. And in *King v. Frazer (c)*, it was only determined that in debt for use and occupation, the place where the premises lie need not be stated, but there was a venue of county and parish; but in *Denison v. Richardson (d)* the declaration was held ill for want of an allegation of time and place.

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LORD ELLENBOROUGH C. J. It is necessary to lay some venue, and the only question is, what satisfies this requisite of a venue. When it ceased to be the law that the jury were to be summoned *de vicineto*, and the statute directed that they should come *de corpore comitatus*, it seems to me that from that time it became enough to allege a county for a venue.

BAYLEY J. In *Denison v. Richardson* there was no venue at all as to the material fact. Here there is a county for a venue, and the only question is, whether that is not now sufficient.

DAMPIER J. I cannot see the use of any thing more than a county.

Per Curiam,

Judgment for the Plaintiff.

(a) 7 T. R. 243.

(b) 2 H. Bl. 162.

(c) 6 East, 348.

(d) 14 East, 291.

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Tuesday,
June 28th.

BUTTERWORTH *against* Lord LE DESPENCER.

Declaration against the maker of a promissory note, payable at a particular place, and avers a presentment at the place, and that the defendant, licet sæpius requisitus, hath hitherto refused, and still doth refuse to pay: Held well upon demurrer, and that a refusal at the particular place need not be averred.

ASSUMPSIT on a promissory note dated the 12th of *October* 1813, by which the defendant six months after date promised to pay 54*l.* 6*s.* 1*d.* being the amount of his (the plaintiff's) bill to that day, and made the same payable at the house of Messrs. *Wright* and Co. bankers, *Henrietta Street, Covent Garden, &c.* And the plaintiff avers that afterwards, and when the note became due and payable, to wit, on the 15th of *April* 1814, the same was presented for payment at the house of the said Messrs. *Wright* and Co. in *Henrietta Street* aforesaid. 2d count omitting that the note was made payable or presented at the house of *Wright* and Co.; also the common counts; and the plaintiff concludes in the usual form, that the defendant hath not paid the said several sums of money, or any or either of them, or any part to the plaintiff, (although the defendant afterwards (to wit) on the same day and year last aforesaid, and oftentimes afterwards at *Westminster* aforesaid, in the county aforesaid, was requested by the plaintiff to pay him the same,) but the defendant to pay the same or any part thereof hath hitherto altogether refused, and still doth refuse, to the damage, &c. Demurrer to the 1st count. Joinder.

Nolan in support of the demurrer took this exception, that there was no averment that payment of the note was refused at the house of *Wright* and Co., and that the general allegation of licet sæpius requisitus would not supply the want of it. In 3 *Taun.* 397. *n. a.* it is

stated that in the case of promissory notes made payable at a particular place, it is necessary to aver a presentment and refusal at that place; and *Bowes v. Howe* is cited in support of that position, though it certainly is not an authority to that extent. But upon principle, this note being specially addressed was in the nature of a check drawn upon the defendant's banker, and imported a qualified promise on the defendant's part, that either himself or some one for him would pay the note at *Wright's*, or that the house of *Wright*, to which it was an authority to pay, would pay it. And therefore it comes within the principle of *Parker v. Gordon* (a), where it was held that if an acceptance be specially addressed, not only a presentment at the place is necessary, but it must appear to have been made at such a time as would make the non-payment amount to a refusal at the place. And in *Saunderson v. Bowes* (b) *Bayley J.* observed that a refusal alleged generally, did not imply a refusal at the particular place. And by the same rule that a demand at the time and place must be averred, which it must be, according to *Rushton v. Aspinall* (c), *Saunderson v. Bowes* (d), *Callaghan v. Aylett* (e) and *Bowes v. Howe* (f), a refusal at the time and place must also be averred.

LORD ELLENBOROUGH C. J. A presentment of the note at the house was a request there to pay the note; and the non-payment of it is a refusal at the house. If it were necessary that there should be a specific refusal in a given form or by some positive act, it might be argued that this general refusal would not be good;

(a) 7 East, 385.

(b) 14 East, 505.

(c) Doug. 679.

(d) 14 East, 500.

(e) 3 Taunt. 397.

(f) 5 Taunt. 30.

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but a refusal need not be by an affirmative act: the not paying, which is only a negative act, or shutting the door, is a refusal. All therefore that is necessary is that there should be a special request, and here a special request is averred. In *Saunderson v. Bowes* we held that we could not infer a special presentment from the allegation of a general refusal. All we say here is that negation of payment every where is a negation of payment at the place.

LE BLANC J. It seems to me that if he has generally refused he has specially refused.

BAYLEY J. It is alleged in this count that the note was presented at *Wright's*, and there is an averment of a general refusal to pay. In *Saunderson v. Bowes* there was no allegation that the note was presented at the place.

DAMPIER J. The question is whether the general averment at the end of the declaration, does not in effect allege that the defendant did not pay the note at the place where it was made payable. Presentment at the house must be averred; but it has never been decided that a special refusal must appear upon the record; and to determine that it must would be to impose a grievous burthen on the plaintiff.

Judgment for the Plaintiff.

Campbell was to have argued on the other side.

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**TOLLING and Others, Assignees of WHITE and
LUBBREN, Bankrupts, against BUCKHOLTZ.**

*Wednesday,
June 29th.*

[THE defendant on the 10th of *May* was arrested by special capias at the suit of the plaintiffs, under a judge's order for 900*l.*, and was afterwards on the 20th of *May* in pursuance of a rule of Court discharged on filing common bail. On the 23d of *June* he was again arrested upon similar process at the plaintiffs' suit for the same sum, and on the same day was served with a rule to discontinue the first action, together with an appointment to tax his (the defendant's) costs on the next day, and the costs were not taxed or paid until that day. Upon an affidavit of these facts, and that the first writ was for the same cause of action as that upon which the defendant had been before arrested and discharged, a rule nisi was obtained for discharging the defendant upon filing common bail.

A discontinuance of a former action is not complete so as to entitle the plaintiff to arrest the defendant upon a fresh writ, until the plaintiff has taxed the costs.

The Attorney General, who shewed cause, contended, that though the costs of the former action were not taxed and paid at the time of the 2d arrest, yet as the plaintiffs had before the 2d arrest tendered to the defendant a sum more than sufficient to cover the costs, that was equivalent to a discontinuance of the former action.

Marryat and *Abbott* contra, urged that the defendant could not be arrested a second time, until there had been a complete discontinuance of the former action, and that it was incomplete so long as the taxation and payment of costs remained unsettled.

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Lord ELLENBOROUGH C. J. and the rest of the Court (a) agreed that the discontinuance was not perfected until the costs were taxed. (b)

Rule absolute.

(a) *Le Blanc J.* was absent. (b) See *Belifante v. Levy*, 2 Str. 1209.

Wednesday,
 June 29th.

HORSFALL *against* MATTHEWMAN.

The plaintiff cannot sign judgment after plea in abatement, because the affidavit to verify the plea was sworn before the defendant's attorney.

THE defendant pleaded partnership in abatement, and the plaintiff notwithstanding signed judgment. And upon a rule nisi for setting the judgment aside,

Scarlett shewed for cause, that the affidavit to verify the plea was sworn before the defendant's attorney; and he referred to the rule of Court, *E. 15 G. 2.* which prohibits attorneys, who are concerned in the cause, taking affidavits in the cause, except an affidavit of the cause of action (a). Wherefore he contended, that as this affidavit could not by the rules of the Court be received, it was the same as if the plea had been filed without an affidavit, and so the plaintiff was at liberty to treat it as a nullity, and sign judgment. And he said the practice was, in such cases, to sign judgment.

Hullock contra cited *Pether v. Shelton* (b), and contended, that the plaintiff ought to have come to the Court, as in that case, to set aside the plea; and it appears, from a note to that case, that where a plea in abatement was put in without affidavit, and the plaintiff signed judgment, the Court set it aside. And if this

(a) 8 T. R. 638. (b) 1 Str. 638. See also 639, and 2 Str. 705, 738.
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plea might be treated as a nullity, this inconvenience would follow, that the proceedings might be upset at any distance of time.

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The Court (a) agreed, that however the plaintiff might have been warranted, under the circumstances, in applying to the Court to set aside the plea, yet he could not treat the plea as a nullity, and sign judgment.

Rule absolute.

(a) *Le Blanc J.* was absent.

MIDDLETON *against* BRYAN.

Wednesday,
June 29th.

IN debt, by the assignee of the sheriff, against the defendant, upon a replevin bond, the plaintiff assigned for breach the not making a return of the goods as awarded in the county court, upon an avowry there made for 30*l.* arrears of rent. And on demurrer and joinder, the plaintiff signed judgment for not returning the demurrer-book in due time for 35*l.* 18*s.* debt, and 16*l.* 10*s.* damages, and afterwards issued a ca. sa. indorsed to levy 35*l.* 10*s.* besides poundage. And upon a rule nisi for setting aside the ca. sa. for irregularity, one ground of objection was, that there had not been any writ of inquiry for assessing the damages.

In debt upon a replevin bond, assigning for breach the not making a return of the goods distrained for rent, the plaintiff may, after signing judgment against the defendant for not returning the demurrer-book, tax the costs and issue execution for the costs, and the amount of the goods distrained as indorsed on the replevin bond, without executing a writ of inquiry.

J. Parke shewed cause, upon an affidavit, that the costs were taxed to the amount of 16*l.* 10*s.*, for which sum, together with 17*l.* 19*s.*, the amount of the goods as valued by the sheriff's broker, and indorsed on the replevin bond, and one guinea for the costs of the ca. sa. the

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ca. sa. issued, and that it was the practice to sign judgment on a replevin bond, as in debt, and upon taxing costs to sue out execution, without executing any writ of inquiry. And in support of the practice he urged that a replevin bond stood upon the same footing with a bail bond; the language of the statute 11 G. 2. c. 19. s. 23. which directs the assignment of replevin bonds, being borrowed from and being nearly in the same words as the 4 Ann. c. 16. s. 20. which regards bail bonds. And in *Moody v. Pheasant* (a) it was held that final judgment might be entered in an action upon a bail bond without a writ of inquiry.

Laves contra contended, that there ought to have been a writ of inquiry. And he distinguished it from an action on a bail bond, where the judgment is for a debt, the amount of which has previously been ascertained by the affidavit of the cause of action. But here the breach is in not making a return of the goods distrained, which sounds only in damages, which damages are unliquidated; and the execution being levied for the supposed value of the goods, that value ought to have been proved.

Lord ELLENBOROUGH C. J. The reason why a writ of inquiry was given by the statute (b) in actions upon bonds for the performance of covenants and the like, was to prevent the necessity of proceedings in a court of equity. But if this Court can afford the same relief to the party as upon a bail bond, the same rule of practice seems to apply.

(a) 2 Bos. & Pull. 446. (b) 8 & 9 W. 3. c. 11. s. 2.

BAYLEY J. (a) The bond is taken in double the value of the goods distrained, and some evidence must be given of the value before it is entered into; and the sureties by executing the bond admit that such is the value. Therefore the value which it is contended ought to be ascertained by writ of inquiry has already been ascertained.

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DAMPIER J. Is not the ascertaining of the value by the sheriff on the oath of one or more witnesses not interested, quite as good as the oath of the party in the case of a bail bond? And the party admits a value by entering into the replevin bond.

Rule discharged.

(a) *Le Blanc J.* was absent.

MOLLING *against* POLAND.

Wednesday,
June 29th.

MARRYAT obtained a rule nisi for discharging the defendant upon filing common bail, for the insufficiency of the affidavit to hold to bail; which was not intitled in the King's Bench, and was only subscribed with the words *By the Court*, at the bottom of the jurat. He contended that the affidavit was uncertain in not shewing in what court it was sworn.

An affidavit of debt not intitled in any court, and only with the words *By the Court*, written at the bottom of the jurat is not sufficient.

Abbott, who shewed cause, suggested that the words *By the Court*, appeared to be in the hand-writing of the Master, and therefore that was sufficient to verify the affidavit's having been sworn in this court; and he said that where the name of one of the Judges of the court

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is affixed to an affidavit, that has been considered as enough to entitle the party to read it as sworn in court. (a)

But *The Court* (b) made the rule absolute, *Bayley J.* saying that they could not take judicial notice of the Master's hand-writing.

(a) See 13 *East*, 189. *Rex v. Hare*.

(b) *Le Blanc J.* was absent.

Wednesday,
June 29th.

JAMES RAMSAY CUTHBERT *against* PHILIP RAOUL
LEMPRIERE.

The testator being tenant of copyhold premises at *Cron-dall*, under four several admissions to the use of himself for life, and of such person as he should appoint, and in default of appointment to the use of himself in fee, subject to certain quit rents, and being seised and possessed of other real estates in *Great Britain and Ireland*, and of a leasehold estate held under two leases at *Blansby*, devised his whole real estate

in lands in Great Britain or Ireland, to his wife for life, and after her death to be divided between his two nephews and their respective issue; and in default of such issue to be divided between the children of his nieces, &c.; and by codicil reciting that he had ordered all his estate in Great Britain and Ireland, after the decease of his nephews without issue, to be divided, &c. he revoked the same, and before that division devised his whole real estate to *B.* and his heirs male, &c. and devised his two leases, with the quit rents of his lands in *Cron-dall* and in *Blansby* to *B.* after his wife's decease: Held that *B.* after the wife's death, took a fee in the copyhold premises.

JOHN TEMPLE, being tenant of certain copyhold premises in *Dippenhall*, in the parish of *Cron-dall*, in the county of *Southampton*, holden of the manor and hundred of *Cron-dall*, to which he had been admitted by four several admissions to the use of himself for life, and of such person as he should limit or appoint, and in default of such appointment, to the use of the said *J. Temple*, his heirs and assigns for ever, subject to a fine of 2s. 6d. on descent and alienation, and a heriot on death, and subject to the payment of certain customary quit rents to the dean and chapter of *Winchester*, by his will, dated the 7th of *February* 1742, after giving an annuity to his daughter for life, and charging his whole real estate with the payment of it, devised as follows: "I will and devise my whole real estate in lands

in Great Britain or Ireland, to the sole use of my wife, during her natural life, and after her death I order it all to be equally divided between my two nephews C. Bentinck and R. Temple, and settle each share upon the issue male of their respective bodies, and in case of failure of issue male, upon the issue female, share and share alike; but with this proviso, that in case one of them die without issue, I give and devise my other nephew's share to the survivor, or in case my nephew R. Temple, or any of his issue male, should succeed to the title and estate of my brother Palmerston, I will and devise my whole real estate to my nephew C. Bentinck, and if neither of my two nephews should leave issue male or female, I order my whole real estate to be equally divided, share and share alike, between the surviving younger children, whether male or female, of my four nieces (naming them). The testator by his will also bequeathed several specific and pecuniary legacies, the latter of which he charged upon his whole real estate. Afterwards, by a codicil of the 6th of March 1745, he devised thus: "Whereas I have by this my will ordered all my estate in Great Britain and Ireland, after the decease of my nephews, C. Bentinck and R. Temple, without issue male or female, to be equally divided amongst the surviving younger children of my four nieces, I think fit to make a codicil as part of my will, and revoke the latter clause, and before that division is to be made, I devise hereby my whole real estate to John Lord Berkeley my nephew and his heirs male, and in default of such issue, to my nephew J. Byron and his heirs male, and in default of such issue to R. Byron and his heirs male, and in default of such issue to their younger brother Byron and his heirs male. I devise my

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two leases, with the quit rents of my lands in Crondall in Hampshire, and in Blansby in Yorkshire, to John Lord Berkeley, after my wife's decease." The testator died in 1752, being then, as well as at the date of his will and codicil, seised of real estates in *England* and *Ireland*, exclusive of the property in *Crondall*; and being possessed of a leasehold estate at *Blansby*, held at the date of his will and codicil under two concurrent leases for terms of years, one determinable on three lives, of which his own was one; and he was not at the date of his will and codicil, or at his death, seised or possessed of any other property or rents at *Crondall* besides the copyhold in question. *Elizabeth Temple* survived the testator, and upon his death entered upon and was possessed of the said copyhold till her death, when Lord *Berkeley*, who survived her, also entered upon and was possessed of the said copyhold till his death, which happened in 1793; but neither *E. Temple* nor Lord *Berkeley* were ever admitted to the said copyhold. No surrender was ever made by the testator to the uses of his will, but it was admitted that the testator's power of appointment under his admission was well executed by his will and codicil.

A question was directed by the Court of Chancery for the opinion of this Court, whether the said *John Lord Berkeley* took any and what estate or interest in the copyhold premises situate at *Crondall*, under or by virtue of the will and codicil of *J. Temple*.

Horne for the plaintiff contended that Lord *Berkeley* took an absolute interest in the copyholds at *Crondall*, under the devise of them in the codicil, and that they did not pass under the general words of devise in the will,

nor under the general words of revocation and institution in the codicil. And this he deduced from apparent intent of the will and codicil, under which testator could not be supposed by the words "my real estate" to mean every part of his real property, because that would be inconsistent with the subsequent devise of "his two leases with the quit of his lands in *Cron dall* and *Blansby*," making the testator first give the whole, and afterwards a part to the person. Unless, therefore, this subsequent devise should be rejected, it imported that the testator meant to give some interest in his lands at *Cron dall*; and if it was a devise of any interest, it was a devise of the whole interest. It is a devise, not of my leasehold lands, but of my freehold; it might be said to be descriptive of locality only, of "my leases," which imports the testator's interest; though it may not be the proper term of art to describe that interest; it is equivalent to a devise of the whole real estate." In *Day v. Trigg*(a) the testator devised leasehold houses, not having any freehold but only leasehold houses; but the Court held that the houses were freehold; and yet the term freehold was as little applicable to the houses in that case, as the term lease to leaseholds in this. But the reason of that decision is that wherever it can be seen that the interest is intended to be conveyed, it signifies nothing that the testator has not used technical words of conveyance, since the court in construing wills are not bound by the technical sense of words, but give effect to the intention. And upon a like reason the cases of *Doe*

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(a) 1 P. W. 286.

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v. *Tofield* (a) and *Doe v. Lainchbury* (b) were lately decided.

Richardson contra, argued that the copyhold lands at *Crondall* passed under the general words of devise in the will and codicil, there being nothing in the subsequent devise, except by a very strained construction of it, to manifest any intent to exclude them out of the general devise. To hold that they did not pass by the general devise, would be to hold that the testator, though he devised his whole real estate in lands in *Great Britain*, meant to die intestate as to lands in *Great Britain* of which he had an estate of inheritance. And as to the effect of the subsequent devise, if the devise be not altogether ambiguous, it seems by the words "my two leases" to relate only to the testator's chattel-interest at *Blansby*, and cannot be extended to the lands at *Crondall* without taking "my two leases" to mean my two leases and also my four copyhold admissions. But supposing that, by reason of the reference to the lands in *Crondall*, this devise must be taken to pass some interest in those lands, yet it does not follow that it passes a fee. If the testator had devised his copyhold lands at *Crondall*, nothing more than an estate for life would have passed, and surely the term leases cannot import a greater interest. As to the cases cited they only shew that if the intent be apparent, the Court will give it effect; but here is not any apparent intent.

Cur. adv. vult.

(a) 11 *Est.* 246.

(b) *Ibid.* 290.

The following certificate was sent:

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We have heard this case argued by counsel and have considered it, and are of opinion, that *John Lord Berkeley* took an estate in fee-simple, in the copyhold premises in question, situate at *Crondall* in *Hampshire*, under the codicil of the said *John Temple*.

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ELLENBOROUGH.

S. LE BLANC.

J. BAYLEY.

H. DAMPIER.

June 29th, 1814.

REGULA GENERALIS.

Trinity term, 54 *Geo.* 3. 1814.

IT IS ORDERED, That from and after the last day of this present *Trinity* term, the Seal-office shall be open from 11 in the morning till 2 in the afternoon, and from 5 to 7 in the evening, during term and for 10 days after every issuable term, and one week after every other term. And from 11 in the morning till 3 in the afternoon at all other times.

END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

1814.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fifty-fifth Year of the Reign of GEORGE III.

VAISSIER *against* ALDERSON.

Monday,
Nov. 7th.

ABBOTT moved to discharge the defendant out of custody, and enter a common appearance, for a defect in the affidavit to hold to bail, the defect being that the affidavit, which was made by a third person, only described the deponent as "of the city of *London*, merchant." And he contended that this was not conformable to the practice or to the rule *Mich. 15 Car. 2. 1663*, which requires "the true place of abode of every person who shall make affidavit in court to be inserted in such affidavit." And the use of inserting the place of abode will be done away, if so large a place as the city of *London* may be inserted, instead of the street or square, which is usually done. And though perhaps this might

In an affidavit to hold to bail, if the deponent be described as "of the city of *London*, merchant," it is sufficient.

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against
ALDERSON.

be a sufficient addition of the party upon an indictment against him, yet the practice has made a greater preciseness necessary in an affidavit to hold to bail.

Lord ELLENBOROUGH C. J. having referred to the statute of additions, 1 *Hen. 5. c. 5.* which requires that in original writs of actions personal, appeals, and indictments, additions should be made of the towns, or hamlets, or places and counties, in which the defendants are or were conversant, said that if the deponent gave himself the same addition as would be good in an indictment against him for perjury, he saw no reason why it should not be sufficient in this case. And the Court agreed that it was sufficient.

Rule refused.

Tuesday,
Nov. 8th.

IMPEY against TAYLOR.

An allegation that an action was depending in his majesty's court of the Bench at Westminster, is not sustained by proof of a pluries bill of *Middlesex*; for by such allegation the Common Bench must be intended.

ASSUMPSIT brought upon the misapplication of a sum of money received by the defendant for the purpose of discharging the debt and costs in an action depending against the plaintiff.

The plaintiff declares, that at the time of the promise, &c. a certain action had been brought and was depending in his majesty's Court of the Bench at Westminster, at the suit of J. S. &c. Plea, general issue. At the trial before Lord *Ellenborough* C. J. at the *London* sittings, the proof in support of the above allegation was a pluries bill of *Middlesex*, which his Lordship being of opinion that the allegation was to be understood as of an action depending in the Common Pleas, held insufficient, and directed a nonsuit.

Richardson now moved for a new trial, contending that "his majesty's Court of the Bench" might mean either the King's Bench or Common Bench; and he said that by this designation both Courts are described in several statutes, and particularly in the stat. 27 *Eliz.* c. 8. they are called the King's Bench and the Common Bench; and the stat. 31 *Eliz.* c. 1. speaks of the Chief Justices of either Bench. So in *Rex v. Leonard* (a) it was held that *Curia de Banco nostro* signified the King's Bench. And here, if the allegation was ambiguous, the defendant ought to have demurred.

1814.

 IMPET
against
TAYLOR.

Lord ELLENBOROUGH C. J. In the case in *Strange*, the Court considered the words *Curia de Banco nostro* as spoken in the person of the king, and therefore equivalent to calling it the King's Bench, as if the king had said "our Bench." But here, supposing the words "Court of the Bench" to be equivocal, the addition of "at *Westminster*" designates by its locality the Court of Common Bench; the Court of King's Bench would have been wheresoever, &c.

Per Curiam,

Rule refused.

(a) 1 *Str.* 302.

BLAKE and Others, Assignees of STRATFORD, a
Bankrupt, *against* NICHOLSON.

 Tuesday,
Nov. 8th.

TROVER for certain numbers or parts of a printed work, called Dr. *Hawker's* Commentary on the Bible. Plea, general issue. At the trial before Lord

A printer employed to print certain numbers, but not all consecutive numbers, of an balance due for

entire work, has a lien upon the copies not delivered for his general printing the whole of those numbers.

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BLAKE
against
NICHOLSON.

Ellenborough C.J. at the *Middlesex* sittings after last term the case was this; the defendant, who was a printer, had been employed by *Stratford*, before his bankruptcy, to print several numbers, not all consecutive numbers, of the said work; of which he printed in the whole 8750 copies, and delivered to *Stratford* 5987, and the residue remained with him in his warehouse. *Stratford* supplied the paper for printing the several numbers from time to time as they were to be printed; and a separate charge was made by the defendant for the printing of each number, amounting in the whole to 494*l.* 2*s.*, of which *Stratford* had at different times paid 185*l.* on account. Afterwards *Stratford* becoming bankrupt, the plaintiffs, as his assignees, applied to the defendant for the delivery of the copies remaining in his hands, tendering to him so much as was due for the printing of those copies, in proportion to his charge for the whole. The defendant refused to deliver them, insisting that he had a lien for the whole balance. His Lordship upon this evidence considered the work as one entire work, and directed a nonsuit.

Gurney moved for a new trial; and contended that the defendant had a right to detain only for the price of printing the particular copies remaining in his hands, and not for the general balance. The printing was done sparsim, upon distinct, and some of them, not consecutive numbers, and the materials were supplied at several times and in distinct parcels, and the charges were made separate and distinct upon each number; the lien therefore ought to extend no farther. General liens were not favoured in the law, and the inconvenience might be great, if they were to be extended throughout a whole work,

work, however voluminous, such as the Encyclopædia for instance, which might be in progress for more than 20 years.

1814.

BLAKE
against
NICHOLSON.

LORD ELLENBOROUGH C. J. I think the defendant had a lien for the whole balance, the work being an entire work in the course of prosecution, upon the same principle that a tailor, who is employed to make a suit of cloaths, has a lien for the whole price upon any part of them. It would be inconvenient if he was obliged to make stops in the course of the work; the nature of the work affords a reason for his general lien.

LE BLANC J. The supplying the paper from time to time did not make it the less one entire work.

BAYLEY J. He does a certain portion of one entire work.

Per Curiam,

Rule refused.

TAYLOR *against* BROOKE.

Wednesday,
Nov. 9th.

CASE against the sheriff of the county of *Chester* for taking insufficient sureties in a replevin bond. The plaintiff declares that whereas *in a certain messuage or dwelling house and premises* situate at *Stockport*, he took and distrained certain goods, &c., as a distress for certain arrears of rent, to wit for the sum of 33*l.* 12*s.* then due and owing from one *Gorton* to him *for the rent of the said premises with the appurtenances*, by virtue of a

Where plaintiff declared that in a certain messuage or dwelling-house and premises, &c. he distrained for the rent of the said premises with the appurtenances, by virtue of a certain demise thereof; proof of a lease of two messuages, re-

serving a rent, and of a notice of distress for the rent of the two messuages, was held not to be a variance.

1814.

TAYLOR
against
BROOKE.

certain demise thereof made to the said *Gorton*, rendering rent for the same; and so the plaintiff goes on to charge the replevying of the said goods, and the proceedings thereon, and that the defendant did not take from *Gorton* and two responsible sureties, such a bond as the statute requires, but wholly neglected so to do. Plea, general issue. At the trial at the last *Chester assizes* the lease was produced, which appeared to be a demise of *two* messuages, reserving a rent for the same, and the notice of distress pursuing the reservation in the lease was for the rent of the *two* messuages. It was objected that here was a variance, the declaration alleging the distress to have been taken for rent due in respect of a messuage or dwelling-house and premises, the proof shewing it to have been for rent in respect of two messuages; and thereupon a verdict was found for the plaintiff, with liberty to the defendant to move for a nonsuit.

Benyon now moved accordingly, renewing his objection; and he contended that if a man demise his messuage and premises, that will not carry another messuage.

But Lord ELLENBOROUGH C. J. said that the word premises here might be considered as a word of cumulative description. And *Bayley J.* the plaintiff distinguished in one messuage for rent due upon that and another. And *Dampier J.* also said that the word premises in the declaration might include the other messuage.

Per Curiam,

Rule refused.

1814.

DOE, on the Demise of BROWNE, against
GREENING.

Wednesday,
Nov. 9th.

EJECTMENT. At the trial before *Dallas J.* at the last assizes for the county of *Gloucester* the case was this :

Thomas Wylde being seised in fee of the remainder, expectant upon the several deaths of three persons, of one undivided moiety of a mansion-house, farm, and lands with the appurtenants, situate at *Coscomb*, and also of one undivided moiety of the manor of *Farmcott*, and of the messuages, farms, and lands with the appurtenants situate within the said manor in the parish of *Gaiting Power*, in the county of *Gloucester*, by his will dated the 24th of *January* 1789, devised to his son *R. B. Wylde Browne* "all the estate and interest whatsoever which I have or can claim either in possession or reversion, of or in any lands, tenements and hereditaments at *Coscomb* in the county of *Gloucester*, to hold to my son his heirs and assigns for ever." The testator died, and after his death, and the death of the last of the three lives, *R. B. W. Browne* entered into possession of a moiety, of the mansion-house and lands at *Coscomb*, and of the manor of *Farmcott*, and the farms and lands within that manor, and afterwards died intestate leaving a son the lessor of the plaintiff, who brought this ejectment for the moiety of the manor of *Farmcott*, &c. And in order to shew that the said moiety, &c. passed under the said devise, the plaintiff offered to give in evidence, that the estate at *Coscomb* formerly belonged to one *Tracy*, who devised it to his grandson in tail,

Devise of "all the estate and interest whatsoever, which I have or can claim, either in possession or reversion, of or in any lands, tenements, and hereditaments at *Coscomb* :"
Held that evidence was not admissible that another estate, not at *Coscomb*, was formerly united and had been ever since enjoyed with the estate at *Coscomb*, in order to shew that it passed under the devise.

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 ———
 Doe
 against
 GREENING.

with a direction that his trustees should lay out the rents and profits during the minority of his grandson in the purchase of land near to *Coscomb*, and settle the same; in pursuance of which the trustees in 1749 purchased the manor of *Farmcott*; and the two estates had ever since been united and enjoyed as one estate. The learned judge rejected the evidence, being of opinion that as it appeared the testator had lands at *Coscomb*, which was sufficient to satisfy the devise, evidence was not admissible to shew that he intended to devise other lands not at *Coscomb*.

Abbott now moved for a new trial upon the rejection of this evidence, though he admitted that the authorities were in favor of what the learned judge ruled. But he said the principal authority of *Doe v. Oxenden* (a), beside that it was still pending in *Dom. Proc.*, was distinguishable from the present; for though that was a devise of "my estate of," which was treated as more favorable to the admission of explanatory evidence, than if it had been as here, a devise of "my estate at," and still the evidence was adjudged inadmissible, yet there is this difference in favor of admitting the present evidence, that it relates to property near to *Coscomb*, whereas in that case the evidence related to estates most of which were at a considerable distance from *Ashton*.

Lord ELLENBOROUGH C. J. inquired of *Abbott* if he had any authorities; to which he answered that he had searched in vain; whereupon his lordship observed that the word "of" was certainly a word of more

(a) 3 *Taunt.* 147.

general description than "at;" and without some authority the court could not permit it to be agitated that a word properly denoting local description, and not general description, could have a different sense given to it by the admission of evidence.

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against
GREENING.

DAMPIER J. added that he was in the case of *Doe v. Osenden*, and nothing could be plainer than what the testator meant by his estate of *Ashton*, if the evidence had been admissible, for he called all his maternal property his *Ashton* estate.

Per Curiam,

Rule refused.

ARNFIELD *against* BATE and Others.

Thursday,
Nov. 10th.

THE plaintiff declares that before and at the time of the promise of the defendants, they were severally and respectively indebted to him in divers sums of money, for goods sold and delivered to them severally and respectively, and for money lent and advanced to them severally and respectively, and for money paid, laid out, and expended by the plaintiff to and for their several and respective uses, and being so indebted they accounted with him of and concerning all the monies so due from them severally and respectively as aforesaid, and upon that account the amount of all the monies due from them severally and respectively to the plaintiff, added and taken together, was found to be the sum of 21*l.* 6*s.*, and thereupon in consideration that the plaintiff at their request would forbear and give time of payment to them, each and every of them, of the monies due from them severally and respectively to the plaintiff,

Where plaintiff declared that defendants accounted with him for all the monies severally due from them, and that the amount of such monies was 21*l.* 6*s.*, and in consideration that he would forbear payment of the monies severally due from them, the gross amount of which was 21*l.* 6*s.*, defendants undertook to pay the said sum, &c., and the plaintiff proved that the sum due to him was 20*l.* 18*s.* Held that this was a fatal variance.

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ARNFIELD
against
BATE.

plaintiff, and the gross amount of which taken and added together was the said sum of 21*l.* 6*s.*, for the space of 14 days, &c. they jointly promised to pay him the said sum of 21*l.* 6*s.* in 14 days, &c. And the plaintiff avers that he did forbear and give time of payment, &c. of the monies, &c. the total amount of which, taken and added together, was the said sum of 21*l.* 6*s.* for the space of 14 days, &c. and long after, whereof the defendants had notice, but that they, not regarding their promise, have not nor has either of them, although afterwards, and after the expiration of the 14 days, &c. and often since duly requested, yet paid to him the sum of 21*l.* 6*s.*, or any part thereof, &c. Money counts. Plea, general issue.

At the trial before *Chambre J.* at the last *Derbyshire* assizes the plaintiff proved the sum due to him to be only 20*l.* 18*s.*; upon which the learned Judge directed a nonsuit, being of opinion, that as the sum laid in the declaration was not under a videlicet, the plaintiff was bound to prove that precise sum, and therefore this variance was fatal; but he reserved liberty to the plaintiff to move to enter the verdict for the sum proved.

Clarke moved accordingly; and he suggested that the plaintiff ought to have recovered on the count upon an account stated.

But *Dampier J.* observed that as the plaintiff's account with the defendants was not a joint account, he could not avail himself of the general count. And upon the other point,

Lord

LORD ELLENBOROUGH C. J. said that here the consideration was expressly stated to be the plaintiff's forbearing payment of 21*l.* 6*s.*, so that the forbearance of a precise sum was the substance of it, and the promise must be taken to have been made with reference to that sum. And though the two sums came very near to each other, yet that would not help the plaintiff, but he ought to have laid the sum under a *videlicet*, and then he would not have been bound by any particular sum.

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—
ARNFIELD
against
BATE,

LE BLANC J. The consideration of the defendants' promise is the forbearance and giving time of payment of the several sums due which are stated to amount to 21*l.* 6*s.*

DAMPIER J. In the case of *Durston v. Tuthan* (a), where the declaration stated the consideration to be the purchase of sheep for 54*l.* 11*s.* 6*d.*, and the price proved was 54*l.* 12*s.* 6*d.* Buller J. held the variance fatal, because the sum was not laid under a *videlicet*; which is decisive of the present.

Per Curiam,

Rule refused.

(a) Cited in 3 *T. R.* 67.

GLOSSOP *against* POLE.

Thursday,
Nov. 10th.

CASE against the sheriff of *Gloucestershire* for a false return of *nulla bona* to a writ of *fi. fa.* against the goods of one *Prestage*. The question made at the trial

In case against the sheriff for a false return of *nulla bona*, an inquisition taken by him

to ascertain the property of the goods taken under the *fi. fa.* finding them to be the property of a third person, not the defendant in the execution, is not admissible evidence for the sheriff.

before

1814.

Glossop
against
Folk.

before *Dallas J.* at the last assizes at *Gloucester*, was whether the property in the goods was in *Prestage*, or had been before the execution, transferred by bill of sale to one *Tyers* a creditor of *Prestage*, or whether such transfer was fraudulent. The defendant offered evidence of an inquisition taken by him, to ascertain in whom the property of the goods was, and of the finding of the jury under that inquisition that they were the property of *Tyers*. The learned Judge thought the evidence inadmissible, and the jury found for the plaintiff.

W. E. Taunton moved for a new trial, on the ground that the evidence ought to have been received; for he said that it did not appear at the trial that the sheriff was indemnified by *Tyers*, so as to make *Tyers*, and not the sheriff, the real defendant, and this evidence was offered, not as conclusive against the action, but in mitigation of damages, to shew that the sheriff had acted *bonâ fide*, and used the best means to ascertain the property. And in *Farr v. Newman* (a), *Grose J.* cites *Dalton* 146, that where there is a doubt respecting the property of the goods, "the safest course for the sheriff is to enquire by a jury in whom the property is; for being found by the jury that excuseth the sheriff." And he also cites *Gilb. Execution*, 21., "If the sheriff doubt whether the goods be the defendant's, he may summon a jury *de bene esse* to satisfy himself whether they belong to the defendant or not. This will justify him in returning that the defendant has no goods within his bailiwick, and mitigate damages in an action of trespass, if the goods seized should happen not to be

(a) 4 T.R. 633.

the defendant's." And Lord *Kenyon* seems to have approved of the authority of *Dalton* (a). It is true, indeed, that in *Latkow v. Eamer* (b), the sheriff's inquisition was holden not to be conclusive evidence for the plaintiff, because, being a mere inquest of office, it was traversable. And though *Eyre C. J.* and *Buller J.* seemed to doubt whether it was admissible at all as evidence of property in a third person, yet the former expressly stated that in trespass where the sheriff was the real defendant, and not the nominal one, such an inquisition would be evidence to lessen the damages. Now that is like the present case, and with that object alone was the evidence tendered.

Lord *Ellenborough C. J.* said that he should think it might perhaps be evidence, if the question were whether the sheriff had acted maliciously, but beyond that he could not see how it could be evidence.

And *Taunton* agreed that it seemed to be considered in the same light by *C. B. Gilbert*, for he, as well as *Eyre C. J.* put the case of *trespass* against the sheriff; and he added, that in the original edition of *Dalton* 1623, he did not find the passage above cited by *Grose J.* in *Farr v. Newman*.

LORD ELLENBOROUGH C. J. I believe it has been considered since that time that the evidence is not admissible in a case like the present. I remember conversing with Lord *Thurlow* upon the subject, who ridiculed the idea of its being considered as admissible.

Per Curiam,

Rule refused.

(a) 4 T. R. 648.

(b) 2 H. Bl. 437.

1814.

GLOSSOP
against
POLE.

1814.

Thursday,
Nov. 10th.

HUGHES *against* SUTTON.

Affidavit to hold to bail "that *R. Sutton* is indebted to plaintiff for money paid and laid out to the use of the said *R. Jackson*," held well enough.

THE affidavit to hold to bail deposed that "*Randle Sutton* (the defendant) was indebted to the plaintiff for money paid and laid out to the use of the said *Randle Jackson*." And for this defect *Pollock* moved to set aside the bail bond.

But Lord ELLENBOROUGH C. J. said that as the name *Randle Jackson* had not before been mentioned, there was nothing to satisfy the word *said* unless *Jackson* were rejected; and therefore he thought that might be done.

Per Curiam,

Rule refused.

Friday,
Nov. 11th.

GROVES *against* BUCK.

A contract for the purchase of a quantity of oak pins, for the price of upwards of 10*l.*, which were not then made, but were to be cut out of slabs and delivered to the buyer, was held not to be within s. 17. of the stat. of frauds.

CASE for not accepting a quantity of oak pins.
Plea, general issue.

At the trial before *Gibbs* C. J. at the last *Dorsetshire* assizes, it appeared that in *April* 1813 the defendant agreed by parol to purchase of the plaintiff, for a sum exceeding 10*l.* a quantity of oak pins, which were not then made, but were to be cut out of slabs, and delivered to the defendant at *Weymouth*. And the question made at the trial was, whether this contract was void by stat. 29 *Car. 2. c. 3. s. 17.* which enacts that "no contract for the sale of any goods, &c. for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods, or give something in earnest to bind the bargain
or

or in part payment, or that some note or memorandum in writing of the bargain be made and signed by the parties to be charged." It was urged for the plaintiff, that inasmuch as the goods were not capable of being delivered at the time of the contract, not being then in existence, the contract was not within this clause of the statute. And of that opinion was the Chief Justice, and ruled accordingly, comparing it to the case of *Towers v. Osborn* (a); and a verdict was found for the plaintiff.

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Gaselee now moved to enter a nonsuit, and he said that if it were *res nova*, the true reading of this clause of the statute should be *divisim, reddendo singula singulis*; that is, that the buyer shall accept part of the goods, if the contract be for the sale of goods capable of delivery; but if not, then there shall be earnest, or a memorandum in writing. And this construction will include every contract for the sale of goods, as well of goods to be made, as of goods made, which are certainly within the same mischief. And though *Towers v. Osborn* was recognized in *Clayton v. Andrews* (b), it may be said of the latter case, that it went upon a very refined distinction, such as would leave scarcely any case of future delivery within this clause of the statute. But the authority of both those cases seems to be narrowed by the subsequent case of *Rondeau v. Wyatt*. (c)

LORD ELLENBOROUGH C. J. The subject matter of this contract did not exist in *rerum naturâ*; it was incapable of delivery and of part acceptance, and where

(a) 1 *Str.* 506.(b) 4 *Burr.* 2101.(c) 2 *H. Bl.* 62.

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that is the case, the contract has been considered as not within the statute of frauds. In *Rondeau v. Wyatt* the thing contracted for existed in the very shape and substance in which it was to be delivered; and it was held that the circumstance of its being to be shipped on board vessels, to be provided by the buyer for exportation, did not take the case out of the statute. And that is very good sense, for if the thing be capable of delivery at the time, why is it not done; but the same reason does not apply, where the goods are not deliverable.

DAMPIER J. The Court in *Rondeau v. Wyatt* distinguished it from the two former cases, by saying that in those cases some work was to be performed.

Per Curiam,

Rule refused.

Friday,
Nov. 11th.

PHILLIPS and Another *against* PRICE.

A declaration by P. and C., assignees of a replevin-bond, stating that they distrained the defendant's goods for rent due to P., is good without naming C. bailiff. Both avowant and person making cognizance may take an assignment of the replevin-bond, and sue jointly upon it. The declaration need not set out the goods distrained: and if it state that the sheriff took the bond in double the value, conditioned for prosecuting, &c. and for making return of the goods in the condition mentioned, and thereupon the sheriff replevied the same, that shews that the bond was conditioned for a return of the goods distrained. And the declaration is not double, because it alleges that the defendant did not prosecute his suit with effect, and hath not made a return.

DEBT by *Phillips and Cotterell*, as assignees of the sheriff of *Gloucestershire*, against *Price*, upon a replevin-bond. The plaintiffs declare that they distrained certain cattle, goods, and chattels of the defendant, for a certain sum of money then due to *Phillips* for rent, and the defendant made his plaint to the sheriff, who thereupon took the bond from the defendant, and three sureties, in double the value, conditioned for his appearing and prosecuting his action with effect against

the

the plaintiffs, for taking and unjustly detaining his cattle, goods, and chattels, in the condition mentioned, and for making return thereof, if return thereof should be adjudged by law, and thereupon the sheriff replevied the same. And afterwards, at the next county court, &c. the defendant appeared and levied his plaint, but did not prosecute his action with effect, and it was adjudged that the plaintiff should have a return of the said cattle, goods, and chattels, yet the defendant hath not yet made a return. Whereby the said bond became forfeited to the sheriff, and thereupon afterwards the sheriff, at the request of the plaintiffs, the averrants in the said cause, by indorsement on the said bond assigned it to the plaintiffs according to the form of the statute. By means whereof an action hath accrued to the plaintiffs, &c.

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And upon demurrer, *E. Lawes* insisted on the following causes assigned; 1st, that it does not appear by the declaration that *Cotterell* made the distress as bailiff of *Phillips*, or by what authority he made it; and the declaration ought to shew by what authority, as in *Dias v. Freeman* (a), the declaration stated that the plaintiff distrained as bailiff. And this being upon special demurrer, no inference can be allowed to supply the omission. 2dly, It does not appear that the plaintiffs were the avowants in the replevin suit, or that they were competent to take an assignment, or to sue as assignees. The stat. 11 G. 2. c. 19. s. 23. only authorizes the sheriff to assign the bond to the avowant, or person making cognizance, in the disjunctive; therefore the

(a) 5 T. R. 195.

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declaration ought to shew in which of those characters they sue; for both cannot sue, the interest of the one being very different from that of the other, the avowant being entitled to the value of the distress taken, or to a return of the goods, but the other only to costs. 3dly, It does not appear by the declaration, what cattle, goods and chattels were distrained; whereas the common practice is to declare that the plaintiff distrained the goods aftermentioned, and then in setting forth the condition of the replevin bond the goods appear. 4thly, It does not appear that the bond was conditioned for returning the cattle, goods, and chattels distrained, but only for returning the cattle, goods, and chattels in the condition mentioned; which though a technical objection is good on special demurrer. Lastly, the declaration is ill for duplicity in stating that the defendant did not prosecute his suit with effect, and also that he did not make a return; for either of those breaches would have been sufficient; if he did not prosecute, that would have been a breach, and vice versâ.

The Court overruled all these objections singulatim. To the 1st, Lord *Ellenborough* C. J. said that the declaration shewed that *Cotterell* made the distress jointly with *Phillips*, for rent due to *Phillips*, the person intitled to it; and what could that mean but that they distrained in the respective characters of master and man? And *Dampier* J. referred to *Dias v. Freeman*. To the 2d objection, *Bayley* J. observed that where the avowant and person making cognizance join, the judgment is that both shall have a return of the goods; and if both shall have a return and their costs, both are interested

interested in an action upon the replevin bond. And *Dampier J.* said that *Dias v. Freeman* was decisive against the objection, for it shewed that a person might take an assignment of the replevin bond and sue upon it, who was neither avowant nor person making cognizance. And in *Archer v. Dudley (b)* it was taken for granted that the avowant and party making cognizance might join. To the 3d objection, the court answered that it was not usual to set forth an inventory of the goods in the declaration. To the 4th, *Dampier J.* said the goods mentioned in the condition, must be the goods replevied, and those were the goods distrained. To the last, *Bayley J.* said that here the defendant instituted his suit, but did not prosecute with effect, and a return was awarded, and he has refused to make a return. And *Dampier J.* added that you must negative both parts of the condition; if the party make a return, he need not prosecute his suit with effect; if he prosecute his suit with effect, he need not make a return.

Per Curiam,

Judgment for the plaintiffs,

Pollock was to have argued on the other side.

(a) 1 B. & P. 381. n.

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Monday,
Nov 14th.The KING *against* LEYLAND.

By charter 7 W. 3. the mayor of *Liverpool* is appointed to be elected out of the 41 common councilmen, and every mayor is appointed an alderman, and it is granted "quod quancumque acciderit aliquem majorem, &c. aut aliquem vel aliquos de ballivis, vel de communi concilio vill. præd. pro tempore existent. obire, seu ab officio suo, vel ab officiis suis, amoveri, vel decedere, sive stare recusare, quod tunc, & in quolibet tali casu, al' idonea persona, vel al' idoneæ personæ, de tempore in tempus, ad & in offic' illius, vel ad & in offic' illorum sic amot', vel obeunt', sive stare recusant', eligetur," &c.; and by subsequent charters every alderman is appointed a justice for the town: Held that the defendant, who was a common councilman, and had once served the office of mayor, and acted as justice for the town, but had since quitted the town, and resided four miles distant, having only a bank there, and was an acting magistrate for the county, was not entitled to refuse to stand at a subsequent election of mayor, though the serving that office would compel him to remove his residence to the town, and prevent his acting as magistrate for the county; and therefore the Court granted a mandamus to take upon himself the office, he having been elected at such subsequent meeting.

BY charter 2 Car. 1. it was granted that the mayor, bailiffs, and burgesses of the town of *Liverpool*, should have power yearly, on the feast of *St. Luke*, to choose, and name, one of themselves, to be mayor for the year ensuing. By another charter, 7 W. 3. it was appointed that there should be 41 of the burgesses, to be called the common council, of which one should be mayor, and that every person who should be mayor, should from the taking up of the said office, be called alderman during his natural life, and that the mayor during his continuance in office, and for one year after his going out of office, and the senior alderman, and recorder, for the time being, should be justices of the peace within the town; and the charter contained this clause, "Et ulterius volumus, &c. quod quancumque acciderit aliquem majorem, recordatorem, communem clericum, aut aliquem vel aliquos de ballivis, vel de communi concilio vill. præd. pro tempore existent., obire, seu ab officio suo, vel ab officiis suis, amoveri, vel decedere, sive stare recusare, quod tunc & in quolibet tali casu, al' idonea persona, vel al' idoneæ personæ, de tempore in tempus, ad & in offic' illius, vel ad & in offic'

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illor' sic amot', vel obeunt', sive *stare recusant'*, eligetur," &c., in such manner, time, and form as in that particular had been used before the making of the charter granted to the corporation 29 *Car.* 2. By charter 25 *Geo.* 2. reciting the appointment of justices of the peace by the former charter for the said town, and that by reason of its increase the number of justices was not found to be sufficient, it was ordained that the mayor should continue to be one of the justices for the said town, for four years after the expiration of his mayoralty, and that the four aldermen next to the senior alderman, while they remained common council men, should be additional justices. And by another charter, 48 *G.* 3. reciting also the further increase of the town, &c. it was ordained that in addition to the mayor and recorder, every person, who should be an alderman, should, while he remained a common council man, be a justice within the town. The defendant was admitted in 1796 one of the common council, and in 1798 was elected mayor, and served, and the following year served the office of coroner of the town, and acted as a justice within the town for four years next after his mayoralty; soon after which, he quitted his residence in the town for one about four miles distant, where he continued to reside ever since, having only a bank in the town, and was an acting justice of the peace for the county. On the 18th of *October* last (the charter day) the defendant, and another of the common council, were nominated for mayor; and after a poll the defendant was declared duly elected, having on the preceding day given notice to the town clerk, requesting him to make it known to the returning officers, and burgesses, that if he should be elected mayor, he would not serve, unless compelled by law;

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which notice the town clerk communicated, before the election, to the returning officers, and several of the electors. Under these circumstances, in order to try the question whether upon the construction of the charter 7 W. 3. the defendant had a right to give and abide by his notice, a rule nisi for a mandamus to him to take upon himself the office of mayor was obtained on a former day; and the case of *Rex v. Brown* was mentioned, in which it was said this charter had formerly come under the consideration of the Court.

Scarlett and *Richardson* now shewed cause, and in addition to the above facts, stated from the defendant's affidavit, that the duties of the mayoralty were such as to require the constant attendance of the mayor upon the spot, and that if the defendant was compelled to serve, he would be obliged to reside in the town, to the great inconvenience of himself and family, and would also be prevented from acting as a justice for the county. And they stated the proceedings in *Rex v. Brown* from a MS. note to this effect: "*Brown* was a resident in the town, and a widower with children. On the 24th of *January* 1783 a rule nisi was obtained for a mandamus to him to take upon himself the office of mayor. *Brown* had some days before resigned his office of common council man, which resignation the corporation had refused to accept. On shewing cause, before the Court determined the question, the counsel for the corporation agreed to a compromise by accepting his resignation of the office of mayor, and to discharge the rule, taking a peremptory mandamus for a new election. Afterwards the corporation re-elected him; and a criminal information was filed against him for refusing to accept the office;

office; which was tried at *Lancaster*, and he was found guilty, and afterwards brought up for judgment, and fined 6s. 8d. Lord *Mansfield* upon that occasion said, that *refusing to stand* did not mean an arbitrary refusal, but the party must have a reasonable and just cause. And both *Willes J.* and *Buller J.* agreed that he must have a legal cause for refusing." It appears therefore that the import of the words "*stare recusare*" in the charter of *W. 3.* was understood to mean upon a reasonable and legal cause. The charter certainly could not mean by those words, a refusal only upon such grounds as would be strictly a legal cause of exemption, for that would be making the words of none effect, inasmuch as without those words every man, who had a legal cause in the strict sense, would be exempted. Unless therefore they mean upon reasonable cause, that is, not capricious but reasonable in law, they mean nothing. Now here the cause of the defendant's refusal is twofold; 1st, as it affects him individually; 2dly, as it affects the corporation and the community. Individually, he has already served the office, and there are others who have not yet served; and the acceptance of it now would require a change of residence; for the mayor, being the *primum mobile*, must be resident on the spot; he is not like a common council man who may be summoned; and this change of residence must continue, not only during his year of office, but during the four years he is afterwards to continue a justice for the town. 2dly, The corporation will be affected by the re-election of one of its members before all the others have served; because by the charters of *G. 2.* and *G. 3.* which appear to have been granted in consequence of the increase of the town, every person who has served the office of mayor is to be

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a justice for the town; if therefore the same person may be re-elected while there are others who have not served, the consequence will be that the policy of those charters, which was to have as large a number of magistrates as possible, will be defeated, and the corporation will be abridged of the number of its magistrates. And the community also will suffer by the re-election of this defendant, for he will be obliged to forego the exercise of his office of justice of peace for the county.

Lord ELLENBOROUGH C. J. said, that it did not appear in *Rex v. Brown* that the Court considered a reasonable cause to mean one addressed to the discretion of the person making it, but only a legal cause. And he asked if it could be put by way of plea upon the record, that this defendant had no house of residence within four miles of the town, and that it would be inconvenient to him to resort thither in order to execute the office of mayor, and afterwards of magistrate. The defendant knew the inconvenience, and yet remained a corporator. As to abridging the number of justices, it did not appear that the number was so diminished, as to create any inconvenience or tend to the obstruction of justice; if that were so, perhaps it might afford a legal excuse. But it did not follow that the whole number given by the charter of G. 3, was necessary; the charter might have provided for a redundancy. There were many causes of excuse, such as incapacity from sickness, or from poverty, which the words of the charter of W. 3. might contemplate, as forming grounds of refusal in the mouth of the elected, without making it a matter entirely of discretion. And at all events it

was open to the defendant to return this matter to the mandamus. Wherefore the mandamus ought to go.

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BAYLEY J. If having once served the office of mayor, and justice, authorizes a refusal under the words "stare recusare," the defendant may return it.

Per Curiam (a),

Rule absolute.

The Attorney-General, Park, Topping, Holroyd, and J. Clarke, were in support of the rule.

(a) *Dampier J.* was absent.

SMEDLEY *against* GOODEN.

Tuesday,
Nov. 15th.

COVENANT upon articles of agreement made between the defendant and *J. Gooden*, his son, of the one part, and the plaintiff of the other, for the taking and keeping by the plaintiff of the said *J. Gooden* as his covenant servant in his trade of a hosier, for the term of five years, and the articles contained the usual covenants to be found in indentures of apprenticeship, and the plaintiff assigned for breach that *J. Gooden* absented himself from his service during the term. After oyer of the articles, the defendant pleaded non est factum; and also that the articles were made for the term of five years, contrary to the statute, whereby they were void.

The stat. 5 *Eliz. c. 4.* relates only to such persons, who bind themselves as apprentices, as are under age, and not to adults.

It seems that contracts of apprenticeship which are voidable, are not avoided by the apprentice's absenting himself from the service.

Demurrer to the last plea. Joinder.

Puller in support of the demurrer, addressed himself to the objection made by the plea, and contended that the articles were not void by the stat. 5 *Eliz. c. 4.* by reason

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reason that they were for a less term than seven years, but voidable only, and he cited the opinion of Lord Hardwicke in *Rex v. St. Nicholas, Ipswich* (a) to that effect; and he said that here the absenting himself from the service did not amount to an avoidance (b). But the Court interposed by inquiring whether it appeared in any part of the record, that *J. Gooden* the son was an infant at the time when the articles were entered into, for if he was an adult, the statute which relates only to persons under age, could not affect this contract; and this would be an answer to the plea in limine.

Scarlett contra argued that 5 *Eliz. c. 4. s. 26.* did not require that persons bound to serve as apprentices should be under the age of 21; all that it required was, that they should be bound to serve for seven years at the least, and that the term should not expire before they should be 24; and by s. 41. all covenants to be made otherwise than is limited by the statute, are clearly void in law to all intents and purposes. Therefore in *Guppy v. Jennings* (c) it was considered that covenant would not lie upon an indenture of apprenticeship made for five years, it being pleaded that the apprentice quitted the service.

Lord ELLENBOROUGH C. J. Can it be maintained that the statute of *Eliz.* was intended to limit the powers of an adult to contract for his labour. The statute may perhaps be thought capable of a variety of bad interpretations, but it is to a considerable degree defunct, and I do not think it can be successfully argued

(a) *Burr. S. C.* 91. 2 *Str.* 1066. *Cas. temp. Hardw.* 323.

(b) See *Gray v. Cookson*, 16 *East*, 13. (c) 1 *Anstr.* 256.

that

that one of its meanings was to restrain the binding, or I should rather say the contracting of adults for their own service. Here it does not appear but that the son was of age at the time of this agreement, and if he was, there is an end of the argument arising from the statute having disabled persons from binding themselves for a less period than seven years, because this person was not within the statute.

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BAYLEY J. The case of *Guppy v. Jennings* was cited and considered in *Gray v. Cookson*. Here the plea alleges no act of avoidance by the party.

Per Curiam(a), Judgment for the plaintiff.

(a) *Dampier J.* was absent.

FOSTER *against* STEWART.

Tuesday,
Nov. 15th.

ASSUMPSIT for work and labour by the plaintiff and his servants, and the money counts. Plea, non assumpsit. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Michaelmas* term the plaintiff was nonsuited, with leave to move to enter a verdict in his favour, with 12*l.* damages, if the Court should think the action maintainable in that form.

Where the plaintiff's apprentice deserted from the plaintiff's ship and went on board the defendant's, and secreted himself until the defendant's ship sailed, when he dis-

covered himself to the defendant, who carried him to *H.*, to which place he worked his passage, receiving his food, and during their passage to *H.* the plaintiff's and defendant's ships were within hail, but defendant did not make known to plaintiff that he had the apprentice on board, and on the arrival of defendant's ship at *H.* the apprentice wished to leave her, but defendant persuaded him to remain, promising him either wages or clothes and pocket-money, under which persuasion the apprentice sailed with him to *E.* and did duty as one of the crew, but received no wages, or clothes or pocket-money: Held that plaintiff was entitled to waive the tort, and bring assumpsit against defendant for the work and labour of his apprentice, and to recover a reasonable compensation for the services of the apprentice from *H.* to *E.*

And

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And upon a rule nisi obtained for that purpose, the Court, on shewing cause, directed a case to be stated; the material facts of which are as follows:

The plaintiff, a ship-owner in *London*, by indenture of the 2d of *December* 1811, took one *S. Plumpton* to be his apprentice for six years, and sent him on board his (the plaintiff's) ship on a foreign voyage. The defendant is master of the ship *Guildford of Shields*, and in *August* 1812, whilst his and the plaintiff's ships were lying at *St. John's New Brunswick*, *Plumpton* having, as he said, been ill treated by the master of the plaintiff's ship, absconded, and went on board the defendant's ship, where he secreted himself without the defendant's knowledge for two days, and until after the defendant had weighed anchor to sail from that place. When they had got about a mile from the land *Plumpton* discovered himself to the defendant, and told him who he was, and from what ship he had deserted. After this, the two ships in the course of their passage to *Halifax* were once or twice within hail of each other, but the defendant did not communicate to the master of the plaintiff's ship, that he had *Plumpton* on board. The defendant carried him in his ship to *Halifax*, to which he worked his passage, and for which he received his food. On the arrival of the defendant's ship at *Halifax*, *Plumpton* wished to leave her, but the defendant persuaded him to continue on board, and told him he would either give him wages or supply him with cloaths and pocket money. At this time the defendant's ship was but thinly manned; and by this persuasion *Plumpton* sailed in her to *England*, and arrived at *Grimsby*, and thence sailed to *Shields*, where he was discharged, and immediately returned to *London*, and surrendered h

self to the plaintiff. During the whole of this period *Plumpton* did duty as one of the crew of the defendant's ship; and the defendant has not paid him any wages, or, given him any cloaths or pocket-money, and 12*l.* is a fair compensation for his services from *Halifax* to *Shields*.

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The question for the opinion of the Court is, whether the plaintiff is entitled to recover; if he is, the rule to be made absolute; if not, the rule to be discharged.

Gaselee contended that the plaintiff was entitled to recover, inasmuch as he might waive the tort, and sue in assumpsit. And 1st he observed that 12*l.* was found to be a fair compensation for the services of the apprentice from *Halifax* to *Shields*, and it could hardly be denied but that an action of some kind would lie against the defendant for the services of the apprentice after his arrival at *Halifax*. Neither could it be doubted that in many cases where tort lies, assumpsit may be brought. In *Hambly v. Trott (a)*, which was trover against an executor for a conversion by his testator, Lord *Mansfield*, in shewing how an executor might be liable for torts committed by his testator, though not in an action in the form of tort, went much at large into the principle of waiving the tort, and bringing assumpsit. "In most, if not in all the cases," says Lord *Mansfield*, "where trover lies against the testator, another action might be brought against the executor which would answer the purpose. An action on the custom of the realm against a common carrier is for a tort and supposed crime; the plea is not guilty; therefore it

(a) *Cowp.* 375.

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will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another, and bring him back, an action of trespass will not lie against his executor, though it will against him; but an action for the use and hire of the horse will lie against the executor." And again, "But where, beside the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." So here upon the same principle, the defendant having, beside the tort committed in taking the plaintiff's apprentice, acquired to himself the service of the apprentice, which benefited him, an action for the value of such service will lie against him, in the same manner as it would survive against his executor. And that the service of the apprentice, which was acquired by a tortious act, belonged to the plaintiff, is clear from *Curtis v. Bridges* (a), where it was held that if the master of one ship take a servant that belongs to the master of another ship, whatsoever wages he receives from the King upon his account, shall be to the use of the first master, being acquired by the labour and industry of his servant. Also in *Hill v. Allen* (b), which was a bill brought by an apprentice who had run away from his master and gone on board a ship that had taken a prize, his share of which was claimed by his master, Lord Hardwicke said, "In general the master is entitled to all that the apprentice

(a) Comb. 430.

(b) 1 Ves. 83.

shall

shall earn, consequently if he run away and go to a different business, the master is entitled at law to all his earnings." These authorities establish the principle; but *Eades v. Vandeput* (a), and *Lightly v. Clouston* (b), decide the question. In the latter, *Mansfield* C. J. has set the matter upon the true ground: for he said, "that the defendant wrongfully acquires the labour of the apprentice, and the master may bring his action for the seduction. But he may also waive his right to damages for the tort, and may say that he is entitled to the labour of his apprentice; that he is consequently entitled to an equivalent for that labour, which has been bestowed in the service of the defendant."

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Scarlett, contra, argued, that independently of the decision last cited, which was founded upon *Eades v. Vandeput*, and was a misapplication of the principle laid down in *Hambly v. Trott*, it would be difficult to shew that the plaintiff in this case could maintain assumpsit. And *Eades v. Vandeput* could not be correctly reported; for it is stated to have been an action for wages, but if so, how could it be material to charge the defendant with knowledge? Knowledge could not be material if the action was upon an implied contract, and therefore it should rather seem that the action must have been for the seduction. The record of that case has been searched for in vain, and Lord *Erskine*, who is reported to have moved it, has been applied to, but has no recollection of it. Then as to the principle upon which a man may waive tort, and bring assumpsit; wherever money is in the

(a) 5 *East*, 39.(b) 1 *Taunt.* 112.

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hands of one man which he bought, in equity and good conscience, to pay over to another, the law will imply a promise on his part to do what in equity and conscience he ought to do; and therefore if a man receive the fees of an office, which office belongs to another, he to whom the office belongs shall have money had and received against him (a). So if a man take the goods of another and sell them, the owner of the goods may waive the trespass, and sue him for money had and received, affirming the sale, because he being in equity and conscience bound to pay over the proceeds to the owner of the goods, the law will imply a promise by him so to do. But what the plaintiff contends for is very different, for he would have it, that if a man seduce the apprentice of another, the law will presume that he contracts to pay the master for the service of the apprentice, and therefore the master may have an action against him for work and labour; but as well might it be said that if a man take the goods of another, the owner of the goods may have assumpsit against him for goods sold. No such principle, however, is to be found in *Hamby v. Trott*, or in any other case, and it would be confounding the distinction between actions if any such principle could prevail. As to the case put by Lord Mansfield of a man's taking another's horse, &c. he only meant to shew that trespass would not lie against his executor, though it would against him; but he never meant that he who took the horse would be liable to an action for the use and hire; at least if he so meant, it may be answered that he has cited no authority for it, and it is not founded in principle. And

(a) See *Aris v. Stukeley*, 2 Mod. 260.

as to *Lightly v. Clouston*, *Mansfield C. J.* seems not to have been quite satisfied with it, or with *Smith v. Hodson* (a), which he thought difficult to distinguish from it; the distinction, however, is this, that there the assignees only affirmed the contract which the bankrupt had made.

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Gaselee in reply. By the same rule that the assignees in *Smith v. Hodson* were at liberty to affirm the contract of the bankrupt, the plaintiff here was at liberty to affirm the contract of his apprentice; both were in fraud of the parties really interested. And if a party may waive the tort and bring money had and received upon the principle that the money, in point of moral right, belongs to him (b), why may he not upon the same principle waive the tort and bring assumpsit for work and labour, where he is entitled to the work and labour? Both remedies are open to him. So trespass lies against a man who is in wrongful possession of another's land, yet the owner of the land may choose whether he will treat him as a trespasser, or have assumpsit for use and occupation; though he cannot have assumpsit after he has treated him as a trespasser. (c)

Lord ELLENBOROUGH C. J. When this case was before me at *Nisi Prius*, the plaintiff's right to recover was rested upon *Eades v. Vandeput*; and it occurred to me at that time, and afterwards still more strongly upon looking into that case, that it is but a very loose note;

(a) 4 T. R. 211.

(b) *Kitchin v. Campbell*, 3 Wils. 304.(c) *Birch v. Wright*, 1 T. R. 378.

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for as to the defendant *Vandeput*, who was in the king's service, supposing an action for work and labour could have been maintained, yet it was work and labour for the king, and not for *Vandeput*; and therefore in his character of captain of a ship of war he could not have been the object of such an action. It does not appear however by the note of that case what the form of the action was; if the captain had enticed away the apprentice, perhaps he might have been liable to tort. But under the uncertainty both of fact and form which attends that case, I think no very material argument is to be derived from it. However there are two other cases, which do afford an argument more pregnant and important for the Court to consider; I allude to the cases of *Hambly v. Trott*, and the more recent case of *Lightly v. Clouston*. I own I should be more inclined, for the better preserving the simplicity of actions, to hold that where the seduction is the cause of action, the action ought to be in tort for the seduction: still I should go the length of holding with the case in *Salkeld (a)*, that where the apprentice in the course of his service had acquired a chattel, trover would lie for it; or if that chattel had been converted into money, that the master might follow it in all its representative forms. But when it comes to substituting the apprentice as an agent of the master for forming a specific contract, it seems to be going somewhat farther than the necessity of the case requires, or the authorities prior to *Hambly v. Trott* appear to warrant. What Lord Mansfield said in *Hambly v. Trott*, "that if a man take a horse from another, and bring him back, trespass will not lie against his executor, though it

(a) *Barber v. Dennis*, Salk. 68.

will

will against him, but an action for the use and hire of the horse will lie against the executor," I can only conceive to be founded on an assumption that the action for the use and hire of the horse would also have lain against the testator, because an executor is liable upon a supposition that his testator would also have been liable to the same species of action; for an executor is liable in the representative character which he bears to his testator. The difficulty therefore is in taking the first step, and saying that the tort may be waived for an action for use and hire upon the contract; that being somewhat different from an action for money had and received for the produce of goods sold by the sheriff; or the case of *Smith v. Hodson*, where assumpsit was held to lie by the assignees upon a contract made with the bankrupt. In this case, upon the authority of *Hambly v. Trott*, in which the power to waive the tort and take to the contract is put by Lord Mansfield, and illustrated by the case of cutting down trees, it is argued that an action for the work and labour of the apprentice, that is for the benefit acquired by the defendant from the service of the apprentice, is maintainable. In *Lightly v. Clouston* the same case was before the Court, and it seems as if the Chief Justice upon that occasion entertained nearly the same doubts as I do now; but he appears to have yielded to the authorities, and to have considered that the master might waive the tort and adopt the contract. I think therefore that these cases, to the authority of which I bend, go the length of the present case, though I must confess that I do not accede to them with the same conviction that I do to many others.

LE BLANC J. I think it has been decided in many cases that tort may be waived, and an action on con-

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tract substituted. I think also that by the help of a few principles the Court will be warranted in determining this case in favour of the plaintiff. It is clearly established by all the cases that the master is entitled to the labour and earnings of his apprentice, during the whole term of his apprenticeship. It is likewise established by the cases, that if those earnings have got into the apprentice's hands, the master may claim and recover them. That was clearly determined in the case cited from equity, where the apprentice having left his master and gone on board a privateer, became entitled to a share of a prize; the case was afterwards compromised, but the opinion of Lord *Hardwicke* was, that the master was entitled to all that the apprentice earned; and although the share had not got into the apprentice's hands, yet it was to be considered as earnings, though in the shape of a share of prize, because it was in the nature of a compensation for the labour and industry of the apprentice. Also in several cases it has been determined with respect to the sheriff who sells goods, or with respect to a person who is in possession, by wrong, where the party might bring tort if he pleased, yet he may maintain an action founded on contract. In the cases which have decided that money had and received may be maintained without any privity between the parties, though it has been truly said that those decisions are founded upon the principle that the money belongs in justice and equity to the plaintiff, yet in order to attain that justice, the law raises a promise to the plaintiff as if the money were received to his use, which in reality was received by a tortious act. These instances are independent of those put by Lord *Mansfield* in *Hambly v. Trott*; which he
 puts

puts as clear law though he does not cite authorities for them. As in the instance of the executor being chargeable for the trees cut by his testator; that imports that the owner of the trees might waive the tort, and bring an action as for trees sold and delivered. In the same manner the case of a man taking another's horse, imports that the trespass may be waived, and an action for the use and hire of the horse substituted. And these cases are independent of *Lightly v. Clouston*, which is a determination on this particular point. As to *Eades v. Vandeput*, it would hardly be a sufficient authority as it stands upon the report alone, without farther inquiring into the form of action, for the Court to found their decision upon, except so far as it supports the general proposition that I set out with, that the master is entitled to the earnings of his apprentice, and that the Court will follow those earnings wherever it can. Here undoubtedly the plaintiff might have maintained tort for the wrongful detaining of his apprentice; but, inasmuch as the defendant has had a beneficial service of the apprentice, the plaintiff may waive the tort and require of him the value of the benefit. I should also be inclined to consider that as there was a contract, the master might avail himself of it, as the apprentice was under an incapacity of making any contract except for the benefit of his master. I should consider it in the same light as where a party purchases under the sheriff, and has not paid, the party interested may avail himself of the contract made with the sheriff. Upon these grounds I think this action is maintainable.

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BAYLEY J. To decide that this plaintiff is not entitled to recover, would be to overrule the decision of

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Lightly v. Clouston, and also to impeach the doctrine in *Hambly v. Trott*. Both cases appear to have been well considered, and no contrary authorities have been produced; and I am not aware that they contain principles inconsistent with others. It has often been laid down that you may waive the tort and bring assumpsit; and in no instance that I can foresee, will that be prejudicial to the defendant; because in assumpsit the party cannot recover more than in an action of tort; in many instances he will recover less. And oftentimes there would be a defect of justice if this could not be done. After the death of the tortfeaser the action as far as it respected the tort would not be maintainable, and therefore there could be no remedy by way of action at all unless the tort could be waived. Thus in the case of taking goods, unless the tort could be waived, no action at all would lie after the party's death. Founding myself therefore on the principles laid down in *Hambly v. Trott*, and upon the decision of *Lightly v. Clouston*, I think this plaintiff is entitled to recover.

Rule absolute (a).

(a) *Dampier J.* was absent.

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GEORGE GOFF'S CASE.

Thursday,
Nov. 17th.

GOFF was committed to the county gaol by warrant of two justices, upon complaint made against him or that he having been duly appointed collector of the rates for the parish of *Richmond*, pursuant to stat. 5 G. 3. c. 41., refused to account, and pay over the monies collected by him by virtue of the act, to *W. S.*, the person duly authorized to receive them; and the justices adjudged that he should be committed to the gaol, there to remain without bail or mainprize until he should have made a true and fair account, and until such money, as upon the said account should appear to be remaining in his hands, should be paid by him or his sureties to *W. S.*; and they required the keeper of the gaol to receive and safely keep him *until he should be discharged by due course of law.* And because the warrant directed that he should be detained "until he was discharged by due course of law," *Curwood* on a former day obtained a habeas corpus, contending that the warrant was void; and he cited *Yoxley's case* (a), *Tracy's case* (b), *Hollingshead's case* (c), and *Baldwin v. Blackmore* (d).

A warrant of two justices, committing the collector of the rates for the parish of *Richmond* to the county gaol, upon complaint against him for refusing to account and pay over the monies collected by him, adjudging that he should be committed to the gaol, there to remain until he should have made a true account, and until such money as upon the said account should appear to be remaining in his hands, should be paid by him or his sureties; was held well, although it concluded by directing the gaoler to keep him until he should be discharged by due course of law.

And now (the prisoner having been brought into court, and the warrant read) *Marryat* contended that the commitment was well enough. And he agreed to the cases of commitments by commissioners of bankrupt, which had been adjudged ill upon a similar ob-

(a) 1 Salk 351. S. C. cited 1 Ld. Raym. 100.

(b) 1 Ld. Raym. 99.

(c) 2 Ld. Raym. 851. S. C. 1 Salk 351.

(d) 1 Burr. 602.

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jection; but he distinguished those cases, and all the cases cited, from the present, because here the warrant did contain an adjudication, conforming strictly to the act of parliament, viz. "that *Goff* should be committed to the gaol, there to remain until he should have made a true and fair account, &c." And therefore here the concluding part, "until he shall be discharged by due course of law," shall not vitiate, but shall be taken with reference to that which precedes, and shews for what time those words are to be understood, i. e. until he shall account and pay over the monies. And this distinction is peculiar to the present case.

Curwood, contra, relied on the cases cited upon obtaining the writ, and contended that this being a commitment in nature of an execution, and not like a commitment to answer for a crime, where the party is necessarily committed until discharged by due course of law, some time ought to have been stated with certainty.

LORD ELLENBOROUGH C. J. If there was any uncertainty on the face of the commitment I should have agreed with the argument. But coupling the premise with the conclusion, is it not in effect the same as if the warrant had directed the gaoler to detain the party until he had accounted? We must read the warrant as if the magistrates had in the conclusion recited or again the adjudication.

LE BLANC J. Some precise authority ought to shewn to justify the Court in adopting the objection made to this warrant. When the party has accou

and paid over the money, he will be entitled to be discharged by due course of law.

Per Curiam (a), The Prisoner remanded.

(a) *Dempster* J. was absent.

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**BIRLEY, Assignee of HOLT, Bankrupt, against
GLADSTONE and Another.**

Friday,
Nov. 18th.

ASSUMPSIT for money paid, money had and received, &c. Plea general issue. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Hilary* term, a verdict was found for the plaintiff for 202*l.* 10*s.* subject to the opinion of the Court upon the following case:

On the 30th of *July* 1812, before the bankruptcy of *Holt*, by deed of charter-party between the defendants owners of the ship *Atlas* of the one part, and *Holt* of the other, the defendants for the consideration therein after mentioned let to freight the said ship to *Holt*, his executors, &c. for a voyage at and from *Liverpool* to *Wylburg* or *Cronstadt*, as directed by the freighter, his agents or assigns, in case the ship could with safety from capture, seizure, or condemnation, enter and discharge her cargo at either of the said ports, with liberty to the freighter in the course of the voyage to call at *Gottenburgh* for orders, and in case the ship should enter and discharge her cargo either at *Wylburg* or

Where by charter-party the ship-owners covenanted to receive a full cargo, and the freighter to load the same, and to pay so much for every ton of flax, &c. which should be delivered at the king's beams at *L.*, and so much per diem for demurrage, and the parties mutually bound themselves, especially the ship-owners the ship, her tackle, and appurtenants, and the freighter the goods to be laden and put on board, in a penal sum, for the performance of every article contained in the charter-party:

Held that the

ship-owners had not a lien upon the goods actually brought home to *L.* for a sum of money claimed to be due in respect of goods which were put on board at the loading port, but afterwards relanded, and restored to the agent of the freighter, under process of the law at the loading port, nor for a sum claimed for dead freight, nor for a sum claimed for demurrage.

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Cronstadt, then that she should load at *Cronstadt* or *Wyburg*, as directed by the freighter, a return cargo to be provided by him for *Liverpool*; but in case the ship could not with safety enter and discharge either at *Wyburg* or *Cronstadt*, then that she should, if so directed by the freighter, proceed to and deliver her cargo at *Stockholm* and there end the voyage; and the defendants entered into the usual stipulations on the part of the owners, that the ship being tight, &c. should be ready on a given day to receive a full cargo, not exceeding 500 tons of salt, and sail to either of the destined ports, &c., and there deliver her cargo to the freighter or his agents according to the bills of lading, and with all convenient speed receive on board a full and complete cargo of hemp, flax, tallow, or other lawful merchandize, and sail therewith to *Liverpool*, and there deliver the same to the freighter or his agents according to the bills of lading, &c., and that the ship should be allowed, for discharging her outward, and taking in her return cargo, 45 running days in the whole, to commence from the time that the master should give notice that he was ready to discharge, and take in the respective cargoes; in consideration of which *Holt* covenanted to load the respective cargoes in *Liverpool*, and at *Cronstadt* or *Wyburg*, and receive the same in *Liverpool* and *Russia* within the days limited, and to pay freight 2*l.* 5*s.* per ton of 40 bushels of salt taken on board, with 1*ol.* per cent. thereon in lieu of pilotage and portcharges on the outward voyage, the same to be paid on delivery of the said outward cargo of salt at the port of discharge in *Russia*, and 12*l.* for every ton of flax and hemp, and 8*l.* for every ton of tallow, which should be delivered at the king's beams at *Liverpool*,
with

with 15*l.* per cent thereon in lieu of pilotage and port-charges on the homeward voyage, with the like rates of freight in proportion upon all other goods shipped at *Liverpool*, the same to be paid on delivery of the said cargo at *Liverpool* by bills not exceeding three months, and it was stipulated that the freighter might keep the ship on demurrage in *Russia* for unloading and reloading there, and for discharging at *Liverpool* at 15 guineas per day. And lastly, for the true performance of every article, matter, and thing therein contained, the parties thereby mutually bound and obliged themselves, especially the defendants, the said ship, her tackle, and appurtenances, and *Holt*, the goods and merchandizes to be laden and put on board the said vessel on the said voyage, each unto the other, and others of them, in the penal sum of 3000*l.* sterling, to be forfeited and paid by the party delinquent to the party observant to the true and punctual performance thereof.

Under this charter-party the ship sailed and arrived at *Cronstadt* on the 10th of *October* 1812, (O. S.) and was wholly discharged and reloaded with about 362 tons of tallow and hemp in the course of that month, and the captain signed bills of lading for them, and there remained 61 bundles of hemp ready to be loaded, but the ship was apparently full. However the ice having blocked up the river on the 12th, the ship was unable to sail that year, and in *February* of the next year, the captain proposed that the hemp should be unloaded and reloaded with as much more as could be put on board, and it was found that she would contain about 35 tons more, but the 61 bundles had by this time been disposed of, and the quantity wanted was ready at *Petersburgh*, but was never put on board. On the 2d of *May* the passage

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was clear for sea at *Cronstadt*, and on the 4th at *Petersburgh*. In the mean time *Holt's* agent at *Petersburgh* having drawn bills upon *Holt* in this country on account of part of the cargo, which bills had been returned dishonoured and protested, applied on the 3d of *May* to the custom-house at *Petersburgh*, stating the circumstances, and praying that he might have the goods relanded and restored to him. A decree was issued to demand the same from the captain or to learn his objections. The captain objected to the relanding, alleging that he had given bills of lading for the goods; the customs required the bills of lading and charter-party to be produced, and upon seeing them made an order on the 12th of *May* conformably to the *Russian* law, to unload a specified weight of tallow which was found to be equal to 149 casks, and bundles of hemp, to be returned to the agent, and if the captain objected, the police was to assist. On the 14th of *May* a warrant issued for that purpose, and the proper officers came on board and took off the seals from the hatches, (the captain having refused his consent) unloaded the goods specified in the order, and delivered them to the agent. While these proceedings were going on, the agent proposed to the captain to give him goods in lieu of those to be taken out, and complete his cargo with other goods, and on a different account, to which the captain objected. On the 3d of *June* the ship was again cleared, after having been kept by a guardship, and was allowed to sail, and arrived at *Liverpool* on the 12th of *July*. The plaintiff paid the defendants 2,374*l.* 8*s.* for the freight of the goods which arrived at *Liverpool*, and required the defendants to deliver them, but they refused so to do, unless the plaintiff would also

them the following sums, viz. 1,161*l.* 12*s.* to be due in respect of the tallow and hemp at *Cronstadt*; which sum if the defendants are o it, is right in amount; 372*l.* 12*s.* claimed in of the space in the vessel, which had been unoccupied after the second stowage; which he defendants are entitled to it, is right in 486*l.* 6*s.* as equal to 31 days' demurrage, or ation in the nature of demurrage. The plainder to procure a delivery of the goods paid the its the above sums out of the bankrupt's estate rotest.

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question for the opinion of the Court is wheplaintiff is entitled to recover all or any, or any the said several sums. If the Court should be on that the plaintiff is entitled to recover all, or any part of them, the verdict to be entered for atiff accordingly; if they should be of opinion plaintiff is not entitled to recover any or any them, a nonsuit to be entered.

dale for the plaintiff contended that he was enrecover all the three sums; and as to the two or unoccupied space, or in other words dead and for demurrage, he argued that the case of v. *Rodie* (a) would be decisive against the claim, re not for the obligatory clause in this charter-binding the parties, the owners the ship and the freighter the goods to be loaded, in a penalty. Here therefore the question was r that clause made any difference, and could ie effect of creating a lien on the goods, beyond

(a) 15 *East*, 547.

that

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that which existed by the general law. No instance is to be found where such an effect has been attributed to it, not one is stated in the treatises upon this subject, and it seems that it cannot be applied to mere breaches of covenant (a). Whether it may not be considered as entitling each party in equity to a specific security on ship and goods respectively, which a court of equity will deal with, is another question. It does not appear that even a court of admiralty has ever acted upon it, and perhaps the utmost that they would do, would be to compel the party delinquent to give bail to the amount of the specific damage or demand made. But if this clause should be held to give a lien for the performance of covenants, the consequence would be that the party would have a lien for the minutest breach, where perhaps the damages were merely nominal, to the extent of 3000*l*. And it is not easy to conceive how goods exactly to that amount are to be ascertained, and with respect to the reciprocal lien upon the ship, a portion of which cannot be detained, that is a difficulty which renders it absolutely abortive. As to the sum claimed in respect of the tallow and hemp relanded at *Cronstadt*, it cannot be called freight, because freight is a reward for the actual carriage, not for the receiving of goods in order to be carried, and there can be no inception of freight till the ship has broken ground (b). So it was decided in *Curling v. Long* (c) although there the ship had actually cleared out for the voyage; and *Blakey v. Dixon* (d) also shews that nothing becomes due for freight by receiving the goods on board; and it was there said that "prima

(a) See *Abbott on Merchant Ships*, 191. 4th edit.

(b) *Melloy*, 12. C. 4. 1. 2. (c) 1 B. & P. 634. (d) 2 B. & P. 321.

facie freight is not due until the arrival of the goods." So in *Mashiter v. Buller* (a), where the bills of lading stated that the freight was to be paid at the shipping port, Lord *Ellenborough* C. J. said "that those words only meant that freight should be paid at the shipping port instead of the port of discharge, and by no means dispensed with the performance of the voyage." Here then the voyage as it regards these goods having never been performed, nor even begun, freight cannot be due in respect of them; neither has the freighter taken back his own goods again, so as to charge him with freight pro rata itineris, for they were taken out under process in invitum of the freighter, and therefore he is not within the rule in *Malynes*, 98. This differs from a policy on freight, which attaches as soon as the goods are on board; for the reason of that is, that wherever the assured has a reasonable expectation which gives him a highly probable interest, such interest is enough to satisfy the statute, and therefore insurable. If then nothing here be due eo nomine as freight in respect of the goods relanded, whatever compensation the defendants may be entitled to in that respect falls under the denomination of dead freight, which reduces it to the question upon the first point.

Joy contra argued that the plaintiff was not entitled to recover either of the three sums, inasmuch as the defendants had a lien in respect of all three under the obligatory clause, and if not in respect of all, at least in respect of the sum claimed for the goods relanded. He said that the intention of the parties in the obligatory

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(a) 1 Camp. N. P. C. 84.

clause,

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clause, was to give a reciprocal security by way of lien upon the ship and goods, for performance of the covenants in the charter-party; for what else could they mean by binding the ship and goods respectively, in a penalty for the performance of every matter contained therein? Unless the clause means this, it means nothing, and as the plaintiff would have it, it is a dead letter, whereas the construction ought to be *ut res magis valeat quam pereat*. Then there can be no doubt that all these three sums are claimed in respect of the non-performance of the matters contained in the charter-party, and therefore fall within the general intent and scope of the obligatory clause. But besides its general intent, if that should be thought doubtful, it has clearly a special intent as it regards the lien in respect of the goods *relanded*, for it especially binds the goods and merchandizes *to be laden and put on board*, not the goods *if they shall be carried and arrive*; and therefore here the criterion upon which the party's right to lien is to depend is expressly pointed out, it is the putting on board; the lien is to attach upon the loading of the goods. Therefore at least for the sum claimed in respect of the goods *relanded* the defendants will be entitled. What was decided in *Phillips v. Rodie* was only applicable to a case where the charter-party did not contain this clause, and nothing was said touching the effect it would have. And as to the objection that there is not any instance in which a court of admiralty or other court has acted upon this clause, neither is there any where it has refused to act, and if there were it would not preclude the party of his lien, if upon the fair construction of the clause he is entitled to it. And with respect to the difficulty of ascertaining what portion of the goods shall be detained

by

by reason that the lien cannot go beyond the amount of the penalty, it may be answered in the language of *Harrison v. Wright* (a), "that the penalty is only auxiliary to enforcing the performance of the contract, and the party grieved may either take the penalty as his debt at law, and assign his breach under the statute, or may bring his action for damages upon the breach of the contract," and in like manner his lien may extend to the damages beyond the amount of the penalty. But further, the ship-owner had a lien in respect of the goods relanded, at the common law, and altogether independent of the obligatory clause. As soon as the goods were put on board, the master's duty and responsibility commenced, and on the other hand he required an incipient right to freight. The shipper cannot demand a return of the goods, after they are once shipped, without satisfying the master for his freight, because the master may, if he will, insist upon prosecuting and completing his voyage, and so entitle himself to the whole freight. It follows therefore that for those goods which were taken out by the agent of the shipper some freight was due, either the full freight, or freight pro ratâ itineris. According to *Lutwidge v. Grey* (b) it was the full freight, because the master would have carried them to the port of delivery, but the shipper would not let him do so, but took them out against his consent. And Lord Mansfield recognized that principle, and the decision, which was founded upon it, of *Lutwidge v. Grey*; and in the same spirit

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(a) 13 East. 343. 4.

(b) *Abbott on Merchant Ships*, 319. 4th edit. S. C. cit. in *Lake v. Lyde*, 2 Burr. 835.

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Lawrence J. in *Cook v. Jennings* (a) said, "the master is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owner of the goods prevents him." The same principle also governed the decision of *Westland v. Robinson* (b), and was laid down in *Hunter v. Prinsep* (c). But if not the whole freight, at least freight pro ratâ itineris was due, because the freighter has received his goods again by the hands of his agent, for as to the acts of the agent having been in invitum of the freighter, if he was agent for loading the goods, he was so for taking them back, there was no countermand of his authority. In either case therefore some freight being due upon this portion of the cargo, whether it were for the whole voyage or only pro ratâ, the master was not bound to part with the possession of it until such freight was paid, and if he did part with it, he might detain any other portion of the same consignment for the freight due upon the whole. That was so decided in *Sodergreen v. Flight* (d), and more than that the defendants here do not require to do, which for the above reasons and authorities it is submitted they are entitled to do. Wherefore the defendants are entitled to a lien not only for the freight of the cargo brought home, but also for all the three sums in question, or at least for one of those sums. With respect to *Curling v. Long*, if it is supposed to lay down as a principle, that a right to freight cannot commence until the ship has broken ground, it is at variance with all the cases where the same question has arisen upon an insurance of freight. That principle also does not accord with the case in 2 *Eq. Cas. Abr.* 98.

(a) 7 T. R. 385.

(b) Cited in 2 Vern. 212.

(c) Per Ld. Ellenborough C. J. 10 East, 294.

(d) Cited in 6 East, 627.

and exceptions to it will be found in *Beaves* *rc.* 87. (a) and in *Dig. lib.* 19. *tit.* 2. *c.* 26.

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Macleod in reply, urged that the obligatory clause inserted to no more than a security for performance of covenants, with a penalty to be enforced by action, in case of breach of the statute. And on the other point he observed that none of the cases so shew that freight was due for the goods reloaded on board the question of lien, but only to suits either at law or in equity for a compensation for freight. On the other hand *Cook v. Jennings* (b) was a direct authority that no action would lie for the freight of goods, because by the terms of the charter-party the freighter only engaged to pay freight on delivery of goods at the king's beams.

Lord ELLENBOROUGH C. J. I am clearly of opinion that no lien existed at the time of bringing this action, but only demand upon which a lien did exist, that is, the cargo actually brought home, having been unloaded. Freight is only due at the common law for the regular bringing of the goods to the place of destination pursuant to the stipulations and terms of the charter-party. If there be not a regular loading of the goods on the part of the freighter so as to give occasion for the earning of freight, that becomes the subject of freight, and is a claim to be made by the shipowner upon the covenant: or if the goods having been regularly put on board, cause shall afterwards be given by the freighter, which prevents the freight from

(a) See 1 B. & B. 636. n.

(b) 7 T. R. 381.

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becoming due on them, in that case also it is a subject of claim under the covenant contained in the charter-party. Here the question is not whether there be any remedy by action, but only whether there be the specific remedy of lien on the cargo. A great deal of argument has been very ingeniously rested on the clause which is to be found at the conclusion of the charter-party, by which the parties "mutually bind and oblige themselves, especially the owners, the ship, her tackle and appurtenances, and the freighter, the goods and merchandizes, to be laden and put on board the ship on that voyage, each unto the other in the penal sum of 3000*l.*" This is a mutual penalty, but if we are to consider the clause in the way of a lien, the remedy will not be mutual; it will stand thus, that the owner of the ship may detain the goods of the freighter as a security for the performance of covenants, but the freighter can never detain the ship, so that there will be no mutuality of lien between them. What remedy lies upon it is left in some degree of uncertainty, in a learned work which has been quoted in the course of the argument. And I do not find from inquiries which have been made, that any case has occurred in which this particular clause has been commented on with a view to the particular remedy it affords. The clause is not familiar to us in *England*, but has been imported from *Pothier*. It is like the charter-party I believe, of *French* origin, and I know not whether there may not be some immediate proceeding upon it in that country. But an obligatory clause is not unfamiliar to us in policies of assurance, by which the assurer binds himself, his heirs, executors, and goods, to the assured. How, it may be said, in an instrument not under seal is he to bind

his heirs? but that again is a form borrowed from the *French* marine policy, where perhaps there may also be a means of enforcing it against the heir. But how can the lien which is claimed in this case be pronounced to exist at law? I do not say that a court of equity might not afford a remedy to the party under this clause, though there does not seem to be any instance of its having so done. But at law what lien is there under it? In *Phillips v. Rodie* it was considered that a lien for freight existed only in respect of freight, which was actually earned by the arrival of the goods at the stipulated place of destination. Perhaps here, as in *Phillips v. Rodie*, an action would lie on the covenant for damages, for preventing the ship owners from acquiring the means of obtaining the freight, by putting on board a deficient cargo. But it is absurd to imagine that this clause, which cannot be mutually obligatory, was intended to give a lien on one side without the like remedy on the other. Whatever benefit therefore is to be derived out of it, seems as if it must be derived through the medium of a court of equity. There has been no remedy afforded under it in a court of law, and still less by means of actual lien; which is the act of the party. This is not freight earned within the terms of the charter-party; it falls under the general covenants, either for demurrage or for providing a full cargo, but the party cannot have this suppletory remedy by way of lien. It would be going too far to hold that this clause gave him a lien for the non-performance of covenants. If he had a lien, the consequence would be that the other party might obtain the goods clear of the lien by tendering the money; but he

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could not by so doing absolve himself from the non-performance of covenants.

LE BLANC J. This is a question, not arising upon an action brought to recover the value of the goods from the ship-owners, but upon an action brought by the assignee of the freighter to recover money paid by him to the ship-owners under protest. With respect to the cargo which has been brought home there is not any question; because it is clear the ship-owners were entitled to detain it, until the money due for freight was paid. As to that therefore there can be no doubt that the plaintiff is not entitled. The next question arises upon a claim for dead freight, or unoccupied space, whether the ship-owners can detain the cargo actually brought home until they are satisfied in payment for a full cargo. And the next question arises upon a claim for demurrage. With respect to these two claims, I think that no question could have been made, had it not been for the concluding penal clause in the charter-party; for without that, the case of *Phillips v. Rodie* would have precluded the question. These two points therefore depend upon that clause. There is only one more remaining question, which arises upon a claim made for freight, in respect of goods which were actually put on board in *Russia*, but taken out again by process conformably to the *Russian* law, in consequence of the charterer having failed in answering the bills drawn upon him. That question depends upon whether freight was earned in respect of them so as to entitle the ship-owners to detain. The two points upon the claim for demurrage and dead freight have been fully discussed and explained by my Lord. It is impossible—

possible that this obligatory clause can be construed to mean that the owners of the ship should have a lien on the goods brought home, for every breach of covenant contained in the charter-party, as for instance the not loading a full cargo and for demurrage. The remedy for such matters rests entirely in covenant: the clause could not mean to give the ship-owners a lien: if such had been its intention it might easily have been expressed in a very few words, that the ship-owners should have a right to detain the goods which should be brought home, until all their demands under the covenants were satisfied. Instead of this, the clause in question is introduced, not for the first time, the effect of which, whatever it may be, cannot be attained fully in a court of law. One strong argument against it is, that one party cannot by possibility avail himself of the lien, I mean the owner of the goods cannot withhold the ship; and so I think the ship-owners cannot avail themselves of this clause, to detain the goods until these specific sums are paid, or in other words, their demands under the covenants are satisfied. They must rest on the compensation to be obtained in damages for the several breaches of covenant. As to the last point, I mean the claim in respect of those goods which were put on board and afterwards relanded and restored, I think the goods cannot be considered as having become liable to freight, because no freight was earned upon them. There is no case to shew that freight has been considered as earned for goods merely put on board, and not carried home, but taken away, before any step made towards the performance of the voyage. It might be a breach of covenant to unload them, after they were once on board, and thereby prevent the

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party from acquiring his freight upon them, but freight cannot be considered as earned merely from the circumstance of the goods having been put on board. An action might lie against the party for misconducting himself, but I cannot consider that freight has been earned upon them, subject to the payment of which the ship-owners are entitled to detain the goods actually brought home. Neither am I prepared to say that the freighter's agent abroad was to be considered as acting in respect of the relanding of the goods as agent for the freighter at home. He acted indeed as his agent in loading the goods, but hostilely to his employer afterwards, when he proceeded under the process of the courts in *Russia*, though what was done by him was in consequence of the act of his principal. It seems to me impossible, in any view of the case, in a court of law to consider that the ship-owners are entitled to detain these goods for this sum of money claimed as freight. Consequently, the Defendants are only entitled so far as freight is due to them on the first point. With respect to the other three sums of money, I think the Plaintiff is entitled to recover.

BAYLEY J. I entirely concur with my Lord and my Brother *Le Blanc*, that the Plaintiff has no right to compel the payment of the three sums, for dead freight, for demurrage, and for the goods put on board in *Russia*, and afterwards unloaded there, and taken away. As to the charge for demurrage, and dead freight, laying out of the case the concluding clause of the charter-party, *Phillips v. Rodie* is in point to shew, that the captain had no right to detain the goods. As to the freight for the goods put on board, and

afterwards taken out, the learned counsel has relied with great ingenuity on *Sodergreen v. Flight*. That case, however, is distinguishable: it was there decided that the master had a lien upon the goods remaining on board, in respect of the freight due upon that portion of the goods, and also upon another portion which had been brought home and delivered. For the Court considered that the portion of the cargo which had been delivered, had been so delivered upon an understanding that the captain was to have a lien for the freight of the whole upon the residue. But here no freight, to be properly called freight, can be considered as due in respect of that portion of the goods which was put on board, and afterwards taken away; whereas in *Sodergreen v. Flight* freight was due. Here we cannot be sure that any freight would ever have become due, in respect of the goods which were merely put on board. In order to entitle a party to freight the goods must reach the port of destination, and be deliverable. How can we say with certainty that this portion of the goods would ever have reached its destination? It is said indeed that the ship and the rest of the cargo did arrive; so they did; but it does not necessarily follow, that if the whole had been on board, the ship with her cargo would have arrived. The ship would have been more deeply laden, or she might have been detained later, or other accidents, in consequence of having the whole cargo on board, might have prevented her arrival. Here, perhaps, the ship-owners would be entitled to damages against the shipper for that portion of the goods which was taken away, but those damages would be in the nature of dead freight, as in the case of *Phillips v. Rodie*. If then the captain had

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no right to detain the goods independently of this last clause, is it the proper construction to be put upon that clause, that it was intended by the parties to subject the goods to a lien? If that were the intention, it would subject the goods to a lien for every breach of the charter-party, however minute; and the owner of the ship would be entitled to detain the goods until he was paid a compensation for damages, however small. That would be so monstrous as to make a construction leading to that consequence absurd. We cannot, unless we were bound by authorities, say that such ought to be its construction. Here the owner of the goods, being bound in a certain sum as a penalty, in like manner as the owner of the ship, it could only be the intention of the parties that the one should be subject to a lien, if the other was also subject to a corresponding lien. But the ship-owner could never have been subject to a lien, therefore it is a fair argument upon the construction to say that neither was it intended that the owner of the goods should be subject to a lien. Therefore the plaintiff is entitled to recover the three sums demanded.

Judgment for the Plaintiff. (a)

(a) *Dampier J.* was absent.

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DAVIES *against* HUMPHREYS.Friday,
Nov. 18th.

DEBT on the stat. 32 Geo. 3. c. 58., against the defendant as town clerk of the borough of *Pembroke*, for a penalty of 100*l*. The plaintiff declares in the 3d count that the defendant, being town-clerk, &c. and an officer of the corporation, and having the custody of and power over the records of the same, on the 10th of *November* 1812, (the same not being *Christmas Day*, *Good Friday*, or *Sunday*,) at *Pembroke*, one *G. Oriel*, and one *J. Furlong*, two freemen of the corporation, did, between the hours of nine in the morning and three in the afternoon, demand of the defendant to permit them to inspect the books and papers wherein the admissions and swearing in of freemen, burgesses, and other members of the corporation, and particularly the appointment of the common council men of the corporation, were entered, and did, at the time of making such demand, offer to pay the defendant the sum of one shilling, pursuant to the statute, but that the defendant so being such town-clerk, &c. then and there, upon such demand of the said *Oriel* and *Furlong*, did refuse and deny them, so being freemen as aforesaid, the inspection of such books and papers, contrary to the form of the statute, whereby he forfeited 100*l*., &c. And in the 7th count he declares in the like form, but confining it to a refusal of the books and papers wherein the admissions and swearing in of the freemen of the corporation were entered, on a demand made by one *J. Leach*, and one *P. Caulsfeld*, two other freemen of the corporation, for that purpose. Plea nil debet. At the trial before

The stat. 32 G. 3. c. 58. does not bind an officer of a corporation, having the custody of the records, to permit any member of the corporation to inspect the order for the admission and swearing in of the freemen, &c. of the corporation, and therefore where the town-clerk offered to permit an inspection of the entries made upon stamps, of the admission and swearing in of burgesses, but refused an inspection of the common council book, in which it was usual to enter the order for the admission and swearing in of the burgesses; held that he did not thereby incur a penalty.

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before *Bayley J.* at the *Herefordshire* assizes, the two several demands as alleged in these counts were proved, and that one shilling was on each demand paid to the defendant by the persons making such demands, and received by him. The defendant on both occasions offered to permit those persons to inspect all the entries made on stamps, of the admission and swearing in of burgesses, but refused to permit an inspection of any other books or papers, although he then had in his custody as town-clerk a book called the common council book, in which it was usual, among other matters unconnected with the subject of this action, to enter the names of the common council of the corporation, (who are made out of the burgesses,) and the order, with its date, of the common council for their admission and swearing in, and that they were accordingly admitted and sworn in. It was also usual to enter orders made by the council for the admission of burgesses in the same book, among other matters unconnected with this suit, containing in the same manner the order with its date made at a common council for the admission and swearing in of the said burgesses (nominatim) at that or any future fortnight's court. And against several of their names is written "Sw." (with a date.) Under the orders so made for the admission and swearing in of common council men, and burgesses respectively, the mayor and common council men sign their names, and after the making of such order for the admission and swearing in of burgesses, any person thereby ordered to be admitted and sworn a burgess, may be admitted at that or any other future court. The aforesaid entries of "Sw." followed by a date have of late years, and since the burgesses have very much in—

n number, been usually made; but formerly, burgesses were not so numerous, it was 7 though sometimes done. This common ok contained entries, in the above forms, of of many of the former as well as present council men and burgesses of the corporation. as on stamps, the inspection of which has 1 refused by the defendant, and which are made in books, exclusively appropriated to se by the defendant, are in the following

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and borough of *Pembroke*. *A. B.*, farmer, ted and duly sworn a burgess of this town gh the 29th day of *November* 1784, as by an council of the 18th *October* 1784.

ct was found for the plaintiff on the two forth, subject to the opinion of the Court above case, whether the plaintiff is entitled on these counts, or either of them. If the l be of opinion he is entitled to recover on verdict to stand; if on one only, the verdict ered accordingly. If he is entitled to re- neither count, a verdict to be entered for the

for the plaintiff, submitted two questions; ther a person in the situation of the defend- g the custody of the records and entries of of the different corporators, is not bound spection, as well of the original orders for ission and swearing in, as of the entries of al admission and swearing in. And, secondly, he is not bound to permit an inspection of the entries

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entries relating to the common council men. He said, that though it was upwards of 50 years since the first statute passed, there did not appear to have been any decision upon the subject; but comparing that statute with those passed subsequently upon the same subject, it seemed to have been the object of the legislature from time to time to extend the right of search, and to give publicity to the entries relating to corporate titles. The first statute is 3 G. 3. c. 15. (*Durham* act), the 4th section of which, with a view to the election of members to parliament, enacts, "that any candidate, &c. upon demand shall be permitted, at any time before and within a month after the election, to inspect the books and papers wherein the admissions of freemen are entered, and to have copies thereof;" which clearly contemplates that there might be more books and papers than one, relating to the same entry. It afterwards imposes a penalty upon the officer "if he shall refuse the inspection of such books and papers;" which words seem to point severally to the book containing the order for admission, and the stamped paper on which the admission shall be entered. And there appears to be good reason for this, for as the stamped entry, as in this case, discloses nothing more than the fact of the party's admission and swearing in on a particular day, in pursuance of a former order which it refers to, how can it be seen without an inspection of that order, whether he was duly admitted and sworn in, which must depend upon whether the order for his admission was made at a corporate meeting duly holden? Therefore to give an inspection of the stamped paper but withhold the original order, would be to permit inquiry but deny information. But farther, the
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when act being found insufficient, the stat. 12 G. 3. 11. was passed; the 2d section of which, "in order that it may be known what persons are from time to time admitted," enacts, "that any two freemen or burgesses, upon demand, shall be permitted at any time whatsoever, between certain hours, to inspect the entries of admission of freemen, burgesses, or other inferior corporators." This was an extension of the right of inspection to corporators with a view to their own government, and it enlarges the power of inspection by admitting it at all times, but it is admitted that this act does not relate to the entries of admissions of common council men. Afterwards came the statute in session, 32 G. 3. c. 58., which was passed as well for incorporation as for parliamentary purposes, and grants 4.) "inspection at all times (except on the excepted days) to any member of the corporation, of the books and papers wherein the admission or swearing in of freemen, burgesses, or other members, or officers of the corporation, shall be entered." This statute is not, like the others, confined to the entries of admission only, but speaks of the admission, or swearing in, evidently treating them as distinct things. And great mischief might result to the corporators at large if it were in the power of the town clerk to refuse them an inspection of the original order for the admission and swearing in of any one corporator; for, suppose the town-clerk to neglect making the stamped entry, the consequence would be, that as any person who has acted as a corporator for six years, is by this statute protected in his office, however defective his title may be upon the original order, the town-clerk would by this means be enabled to conceal from every

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every corporator the names of such persons whose titles were defective, until it was too late to object to them. 2dly, The entries relating to the admission of common council men are within the comprehension of the last statute, for the words are "freemen, burgesses, or other members, or officers of the corporation," not "other inferior corporators," as in the former act; and here it appears that the common council men are members of the corporation.

LORD ELLENBOROUGH C. J. We do not sit here to make penalties, but to say whether they have been incurred. The statute, in giving permission to inspect books and papers, meant books where there are books, and papers where papers, in order that it may be known who are the members of the corporation, but not of every book and paper. It might, for any thing I know to the contrary, have been very convenient to have extended this provision, but in construing a penal act we are only to look at what it has said and given. It only gives an inspection of the books and papers wherein the admission or swearing in shall be entered. Now an order for the admission and swearing in is a very different thing, it does not make the party a corporator.

LE BLANC J. An appointment of a common council — man cannot be said to be an admission of a member of the corporation.

BAYLEY J. The argument is that an order for admission is a part of the admission.

Verdict to be entered for the Defendant. (a)

W. Owen was to have argued on the other side. —

(a) Dampier J. was absent.

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The King against The Inhabitants of BEAULIEU.

Saturday,
Nov. 19th.

UPON appeal against an order of two justices, removing *Ruth Peters* and her two children from the parish of *Milton* to the parish of *Beaulieu*, both in the county of *Southampton*, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper is the wife of *Hans Peters*, and her maiden settlement is in the parish of *Beaulieu*. *Hans Peters* is a *Swede*. Some years ago he entered into the *British* service, as a soldier in the 3d battalion of the 9th regiment of foot, and in 1806, was invalided, and sent to the depot at *Lymington*. During the period of his being at that depot, it was suggested to government, by the commanding officer there, that it would be an economical plan to give the invalids leave of absence, upon their agreeing to relinquish their pay during such absence. The suggestion was approved by government, and ordered to be carried into execution. In the beginning of the year 1808 *Hans Peters* hired himself, as a monthly servant to *Mrs. Bowles*, of *Lymington*, and afterwards, on the 20th of *July* in that year, being then unmarried, hired himself to *Mrs. Bowles* for a year, and served such year in the parish of *Lymington*. Previously to this second hiring *Mrs. Bowles* applied to the commanding officer at the depot, to know if *Peters* might hire himself for that period, and was told that he might. During the whole of his service for a year with *Mrs. Bowles* he received no pay, nor was he called upon to perform, nor did he perform, any military

An invalided soldier at the depot, who, in pursuance of an order from government, had leave of absence upon agreeing to relinquish his pay for the time, which leave was renewed from time to time, by furlough, for different periods of three, six, and four months, which he procured by going to the depot for them, was held not to gain a settlement by hiring and service for a year, not being *sui juris* lawfully to hire himself within the stat. 3 W. & M. c. 11., though before such hiring the mistress applied to the commanding officer at the depot, to know if he might hire himself for a year, and was told that he might, and during the year's service he received no pay, nor was he called upon, nor did perform any military duty.

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duty; but he used to go to the depot in *Lymington* from time to time to get his furlough renewed, which never took him more than half an hour. The commanding officer, on his evidence, said, that he could send for him at any time, if the exigencies of the state required it. The books of the depot were produced, from which it appeared that *Peters* was invalidated in *September* 1806; that on the 25th of *September* 1808 a furlough was granted to him till the 25th of *December*; that on the 23d of *December* it was prolonged till the 23d of *June* 1809; that on that day it was prolonged till the 23d of *October*, from thence to the 23d of *December*, and from thence to the 23d of *April* 1810; that he returned again to the depot on the 12th of *February* 1810, and was discharged on the 5th of *November* 1810.

Schwyn, in support of the order of sessions, contended that *Peters* did not gain a settlement by this hiring and service, inasmuch as, by reason of his being a soldier at the time, he was not sui juris to hire himself for a year. And, 1st, he observed that the 3 *W. & M. c. 11.*, by which persons might formerly have gained a settlement by delivery and publication of notice, expressly excepted a soldier from the operation of that provision until after the dismissal of such soldier. From which he argued that the 7th section of the same statute, which enabled persons to gain a settlement by hiring and service without delivery of notice, though not followed by a similar exception of the soldier, yet must be taken as subject to it, for the language is, "if he shall be *lawfully* hired," which means lawful as well in respect of the foregoing exception, as in

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other

other respects. But, independently of that objection, and upon the same principle on which it has been held that an apprentice during the subsistence of his indentures (a), or a soldier who is a deserter (b), are incapable of acquiring a settlement by hiring and service, a settlement was not acquired in this case. The principle is, that to every contract there must be parties competent to contract; from which it follows, that the party who hires himself as a servant must be disencumbered from any other relation which may defeat the performance of his engagement; for unless he be so, he is not free to contract, and if he be not free to contract, he cannot be lawfully hired. Now the obligation that results from the relation in which a soldier stands, is at least of equal force with that of an apprentice; his duties to the state may surely be placed in the same scale with the duties of the apprentice to his master; both are incompatible with an unqualified engagement to serve another. Nor does the consent of the commanding officer to this hiring alter the case; for supposing he had authority to give such consent, yet he could have sent for the man at any time according to exigencies; his consent, therefore, was revocable; and for this reason the consent of the master to the apprentice's hiring himself to another, will not entitle the apprentice to a settlement by hiring and service. Also *Rex v. Norton* seems decisive of the present case, for the Court came to that determination, not upon the ground of the party's being a deserter, but because, being a soldier, he was not

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(a) *Rex v. Buckingham*, 1 Str. 582.; and see cases cited in note 9 East, 207.

(b) *Rex v. Norton*, 9 East, 206.

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sui juris, and they expressly put it upon the footing of the apprentice's case, which was decided, say the Court, not on the ground of its being an excepted case, or as standing upon any occult efficacy in the indenture of apprenticeship, but on the broad principle of his not being sui juris. As to *Rex v. Westerleigh* (a), and *Rex v. Winchcombe* (b), perhaps the best way of considering those cases is, that the militia-man is not, like the soldier, incapable of contracting for his service, but that he may do so, subject to the master's dispensing with the excepted month, in case he should be called out. And a distinction seems also to have been observed in *Rex v. Walpole, St. Peters* (c), and *Rex v. Woburn* (d), between the nature of a militia-man's service, and that of a soldier in the line.

Scarlett and *Gaselee*, contra, denied that the words "lawfully hired" in the statute of *W. & M.* were to be construed as being subject to the exception mentioned, which they said was made *diverso intuitu*, namely, that a soldier who before the statute was not an object of removal, should not by notice, which was applicable only to persons who were removable, become entitled to a settlement. And therefore the question was simply, whether the pauper's husband was lawfully hired. To try that question by the principle laid down on the other side, it cannot be doubted that he was competent to hire himself, for he had leave so to do, and had purchased that leave by paying an equivalent for it in the relinquishment of his pay; by which

(a) *Burr. S. C.* 753.(c) *Lurr. S. C.* 638.(b) *Doug.* 391.(d) 8 *T. R.* 479.

means he was disencumbered from that relation, the fulfilment of which would have been incompatible with the performance of any other service. But though he was disencumbered, he was not divested of it; a time might come when his services would be required, and therefore he made known his situation before he hired himself, which was in effect hiring himself upon a condition that his duty as a soldier did not call him away; or so the law, which will not compel a man to contract beyond his ability, will imply, and that which must of necessity be implied need not be expressed. It may be asked, then, what rule of law is there against his so hiring himself, or whether there be any real difference between such a hiring, and a hiring for a year, either party to be at liberty to determine the contract, at any quarter of the year, giving a month's notice (*a*); or a hiring for a quarter of a year, and if the parties liked each other, to continue for the remainder of the year (*b*); or, as in several other cases of conditional hiring (*c*), all of which have been held to confer a settlement. And surely if the two cases of the militia-men (*d*) be supportable, it follows that this must be. Although a month only was expressly excepted in those contracts, yet the duties of the militia-man might have called him away for a longer time, or even for the whole time he had contracted for; a militia-man can no more contract for a period of service which shall be liable to no interruption, than can a soldier. And if, because some paramount duty may interpose to de-

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(*a*) *Rex v. Alberton*, Burr. S. C. 203. (*b*) *Rex v. Lidney*, Str. 950.

(*c*) *Rex v. New Windsor*, Burr. S. C. 19. *Rex v. St. Ebbs*, ib. 289.

(*d*) *Rex v. Westerleigh*, Burr. S. C. 753. *Rex v. Winchcombe*, Doug. 391.

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feat the performance of his engagement, a party shall be precluded from making any engagement at all, by the same rule a sailor, after he is paid off at the end of a war, would be precluded from hiring himself, because, his name being still on the books, he is liable to be called upon again by the admiralty, in case the exigencies of the state demand his services; or if this rule were pushed a little farther, every subject would be incapable of hiring himself, because his services may by possibility be required by the paramount call of the state. The services of an invalided soldier are but in a small degree more likely to be put under requisition than those of a subject; here, therefore, was the strongest probability of the party's being able to perform this contract, and he made known, and provided for the alternative, to which the mistress must be taken to have assented. The condition, however, has not taken place, and he has served the whole year; therefore he has acquired a settlement. The incapacity of an apprentice to contract for his service during the continuance of his indentures is for this reason, that his indentures being under seal cannot be dispensed with by a parol contract; but still if his master assent, he may acquire a settlement, by agreeing to serve and serving another; only for the above reason, it will be a service referable to the indentures. So *Rex v. Norton* was adjudged upon circumstances quite beside this case, for there the pauper was a deserter, and was guilty of an offence in the very act of hiring himself, and imposed upon his master by concealing from him his situation; so that there was no ground for considering it as a hiring upon an implied condition resulting from his situation, for that situation was not known to the master.

ster, and if it had been, he would have been perhaps criminis if he had hired him.

LORD ELLENBOROUGH C. J. To confer a right to a tlement by hiring and service for a year, as there are words in the statute which qualify the general sense the word hiring, I must take it to mean an absolute, qualified, indefeasible hiring, that is, a hiring by which the party, who hires himself, has the power of communicating to the master an absolute right to his service for the whole time. In order therefore to do this, the party must be sui juris, and have the faculty of disposing of his own service. I think this case falls strictly within the analogy of the case of the apprentice, who in respect of his obligation to serve one master, is enabled from entering into a contract to serve another. However, the cases of the militia-men have been pressed upon our attention. I would wish to speak of those cases, as of the decisions of persons who have gone before us so highly venerable, with all the respect that is due to them, and I would therefore avoid trenching upon them as little as possible. But when I find them making of leaning in favour of settlements, and when I recollect that a pauper must be provided for somewhere, either as a settled inhabitant, or as casual poor, and when I find too that one of those decisions goes the length of holding, that 11 months may mean a year, I am really unable, with all the respect I bear to those persons who decided them, to go along with them so far. Perhaps, therefore, it may be the best thing to say of the militia-men's cases, that they are to be considered exceptions. Here it appears there has been a hiring for a year, but not a lawful hiring in the sense of an

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effectual hiring. An effectual hiring is, where the servant is enabled to give the master a quid pro quo. Had this person the power of so doing? He had not. There was a halt, and pause to be made four times during the year, until he should renew his furlough. If the question were raised upon special verdict, whether this was an effectual hiring, understanding by that that the party must have a capacity of conferring what he stipulates for, could it be argued upon a statement of these circumstances, that the pauper's husband really passed to the master an interest in the whole of his service? His service in reality belonged to the crown, and he could only contract for so much of it as was remitted out of the right of the crown. It appears to me therefore that here has been no lawful hiring for a year, inasmuch as the servant had not the faculty of communicating the service he contracted for. It is said, here was no fraud, and that is true; but there is the vice of the argument, for this is not a question between the master who hires, and the man who is hired, but whether a condition, which the legislature has imposed on this branch of settlements, has been complied with. The question is, whether this be such a hiring as the legislature intended. It seems to me that it is not, and that the reasoning in the case of the apprentice applies with full force to the present case. Therefore there not being such a hiring as the statute requires, the pauper's husband has not gained a settlement.

LE BLANC J. The pauper and her children have been removed to her maiden settlement, which removal has been confirmed at the sessions. And the question now made is, whether or not she is entitled to a settlement from her husband. Her husband was a person

who originally had no settlement of his own; and the doubt is, whether he has gained one by hiring and service. The case states him to be an invalided soldier in the *British* service, and under military orders at the depot. In that situation he was, no doubt, to all intents and purposes a soldier, and subject to a controul and command inconsistent with his entering into any other absolute engagement to serve another master. While however he remained at the depot, a plan was devised for giving the invalids leave of absence, they agreeing to relinquish their pay. Still the invalid was only to be absent on such leave as was granted, and that leave was to expire at a limited period; and if not renewed, he would be obliged to return to his duty under the penalty of being treated as a deserter. In this situation of things, the pauper's husband enters into this contract. And the doubt is, if it be a lawful contract; not lawful, as it regards his being guilty of a crime, or as it affects his right to recover wages, but whether lawful within the meaning of the statute. I pass by the argument that by the 3d and 4th of *William* the Third a soldier is made incapable of gaining a settlement by notice, because I think it does not apply to the present case. The question turns simply on this, whether that is within the meaning of the statute a lawful hiring for a year, where a person, who is under a legal disability in consequence of having entered into a different obligation which subjects him to be called upon whenever the exigencies of the state require, contracts the relation of servant absolutely for the period of a year. In this view the case steers clear of the cases upon conditional hirings, where the party being perfectly *sui juris*, is capable of contracting, but reserves a power of deter-

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mining the contract with notice at any given time or times. For here at no time could the party make a valid contract for a year. He could not transfer to the master the controul over his services for that time. Nor do the cases of *Rex v. Westerleigh*, and *Rex v. Winchcombe*, respecting the militia-men, which have been particularly pressed upon the Court, seem to me to be precisely in point. Those cases, which have decided that a militiaman may enter into a contract of hiring and service for a year, with a reservation of a time for performing his military duties, are not to be disturbed, but still they are not to be extended, and to be applied to soldiers in the king's service, who contract in a way incompatible with the obligations of that service. The present case seems rather to fall within that class of cases which have decided, that if a man be under an engagement which obliges him to render to another his full services, he is incapable of entering into a lawful contract of hiring and service within the statute. Such was the apprentice's case; and it makes no difference that the master to whom he is bound does not avail himself of his rights to call for the service of his apprentice. Such also was the case of *Rex v. Norton*; there indeed the pauper was a deserter; but the principle of that decision did not turn entirely on that circumstance. The term "lawful hiring" was not construed according to the sense of whether the party, in making the engagement, was acting morally or legally wrong; he was, indeed, in consequence of desertion, subject to military punishment; but the principle of that decision was this, that he was liable at any moment to be taken from the service of his master. His contract therefore was of that description which did not give the master an absolute controul over
his

is services during the period contracted for. I would wish to lay out of the case all distinctions which do not apply to the true principle, viz. whether the party was a condition to make the contract. Here certainly nothing was criminal; the mistress had notice, and so had the commanding officer; and it is to be collected, from what is stated, that it was his opinion at least that it was not probable the man would be taken out of the service during the time; but still he remained liable to be called on, whenever the exigencies of his military duty required, and in compliance with that duty was actually obliged at stated intervals while he was in the service of his mistress, to repair to the depot and there present himself, in order to obtain a renewal of his furlough. It might perhaps have been renewed by means of an application by letter, without personal attendance, but still the terms upon which the leave of absence was granted, were for a limited time only; and unless he had returned at the expiration of that time, he would have been liable to be apprehended as a deserter. And as to his being able to renew the furlough in so short a space of time as stated, that will not alter the question; the law must be the same, whether the mistress lived 100 miles off the depot, or in the same town. It seems to me, therefore, that the husband of this pauper did not gain any settlement at *Lymington* by this hiring and service, inasmuch as he was incapable of entering into a lawful contract within the statute.

BAYLEY J. I am so unfortunate as to entertain a different opinion; and to think that this hiring was sufficient to confer a settlement at *Lymington*. I do not find it mentioned in the act of parliament that there must

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must be an indefeasible, but only a lawful hiring. Here there certainly has not been an indefeasible hiring, but I think there has been a lawful hiring, for a year, subject to be defeated in one event, but that event on which it might have been defeated has not occurred. Under these circumstances it seems to me that we should be doing no violence to the act of parliament by holding that this was a sufficient hiring for a year to confer a settlement. The words of the act are, "if any person shall be *lawfully hired*;" and it is agreed that here was nothing unlawful in the hiring; that is, that the person who hired himself had a power to contract for a year, provided he was not taken out of the service by his military duties. The mistress was given to understand that he was liable to be taken away; there was therefore no improper concealment, and the contract was such as the party contracting might lawfully make, subject to the above understanding, being made at a time when he was *sui juris*. It was certainly, as I have said, liable to be defeated, but so may many other contracts, which nevertheless would be sufficient to confer a settlement. To instance in one particular, namely, the case that has already been put in argument. Suppose the master of a servant, having occasion to go abroad, was to say to his servant, whom he left at home, I may be absent only six months, or possibly I may be absent five years; in the mean while take you care, in the bargains which you shall make, that you keep yourself at liberty to come back to me on my return. Suppose under these circumstances the servant does enter into a contract with another master to serve him for a year, provided his former master should not in the mean time return, I apprehend that that would be a good and valid contract
of

of hiring for a year, such as would confer a settlement. The case of *Rex v. Norton* seems to me perfectly distinguishable; because, there the servant in the very act of making the contract was doing that which was unlawful. He was a deserter, and beside that, he never apprised the master of his situation, who was deceived by this concealment, and did not acquire that controul over his service which he, the master, had a right to expect. Every moment of his continuance in the service was an illegal act. So in the case of an apprentice, if he contracts to enter into the service of another, he does so either with or without the consent of his master. If with the consent of his master, it is a service to the second master under the indenture; and he gains a settlement by such service, it being referable to the indenture. If he hires himself to a second master without the consent of his first master, it is an illegal act on his part, and he is not in the terms of the statute lawfully hired. The cases of the militia-men are certainly not such as I should choose altogether to rest my opinion upon; in the first of them (a) the pauper was only probably liable to be taken out of the service for one month; however, he was possibly liable to have been taken out for the whole year, if the crown had thought fit to require his services. The bargain was this: I will serve for a year, but may have occasion to attend my duty as a militia-man for about a month; but if I am taken out of your service, I will pay another to serve in my place, or make allowance in my wages for the time of absence. Now if that which to-day is contended to be an objection, is valid, it would have been

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(a) *Rex v. Westerleigh*, Burr. S. C. 753.

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open in that case to have objected, that the party was not in a condition to make any contract at all to serve for any portion of time, because he was liable to be called upon in another service during the whole time; but yet that hiring was held sufficient. As to the doctrine that settlements ought to be favoured, it is not a doctrine on which I rely; because I conceive it to be in the eye of the law a matter perfectly indifferent where the party is settled. The next case of *Rex v. Wincombe* is open to the objection that there was a service but for 111 months. However, without the aid of these cases it seems to me that here the party was *sui juris*, to enter into the contract; that this was a contract which was only defeasible, and would confer a right of action to the master, if the servant absented himself on any other grounds except that of his being called upon by the act of government. For these reasons, and as I do not find any thing in the statute but the word lawful, to limit the nature of the hiring, and inasmuch as there has been a defeasible hiring for a year, which has not been defeated, and the party who was hired committed no fraud, but communicated the circumstances to the person who hired him, it strikes me, that this was a sufficient hiring to confer a settlement.

Orders confirmed. (a)

(a) *Dampier J.* was absent.

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The KING *against* The Inhabitants of DODDER-
HILL, in WYCH, otherwise DROITWICH. *Saturday,*
Nov. 19th,

THE Court of Quarter Sessions for the county of Worcester discharged an order of two justices for the removal of *John Hill*, his wife and children, from that part of the parish of *Dodderhill* lying in the borough of *Wych*, otherwise *Droitwich*, to the parish of *St. Peter*, in the said borough, subject to the opinion of this Court on the following case:

John Hill, the pauper, being legally settled in *Wolverly*, hired himself as a servant in husbandry to one *Broad*, who occupied a farm in the parish of *St. Peter*, to serve him for the weekly wages of four shillings, board, washing, and lodging, except in the harvest month, when his wages were to be increased to ten shillings and sixpence per week, and then again to be reduced to four shillings. At the time of the hiring nothing was said as to the length of time the pauper was to continue in the service of *Broad*. Under the above hiring the pauper served *Broad* eighteen months in *St. Peters*, residing there, and receiving the four shillings per week, as agreed upon, except during the harvest month, when his wages were raised to ten shillings and sixpence, and at the end of that time fallen again to four shillings.

A servant in husbandry, hired to serve for the weekly wages of 4s., board, washing, and lodging, except in the harvest month, when his wages were to be increased to 10s. 6d. per week, and then again reduced to 4s., does not gain a settlement; for that is only a weekly hiring.

Peake, in support of the order of sessions, relied on *Rex v. Pucklechurch (a)*, and the rule there adopted,

(a) 5 East, 382.

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after a consideration of all the cases upon the subject, "that where nothing is said in the contract about time, but only a reservation of weekly wages, it is only a weekly hiring." Such, he said, was the case here; for *Rex v. Dedham* (a) shews that the reservation of higher wages in the harvest-month does not necessarily import that the parties intended more than a weekly hiring: there the servant let himself summer and winter, yet as it was at so much a week it was held to be but a weekly hiring. And if the mention of summer and winter, which comprises the whole year, had not the effect of altering the import arising from the reservation of weekly wages, à fortiori the mention of the harvest-month, which is but a small portion of the year, shall not have that effect. Nor is this case like *Rex v. Hampreston* (b) and that class of cases, where, upon a hiring at weekly wages, with liberty to part at a month's notice, it has been held a hiring for a year; because there the introduction into the contract of a month's notice being inconsistent with a weekly hiring, shews that the reservation of weekly wages could not be intended to controul the duration of the contract.

Fuller (with him *Abbott*) contra, agreed to the rule in *Rex v. Pucklechurch*, but he relied on these two circumstances to shew that the parties contemplated a yearly hiring, 1st, that he was hired as a servant in husbandry, the period of which service is usually for a year; next, that exception was made in the harvest-month, which could not reasonably be referred to any thing else than that the parties were providing for the relation of master

(a) *Burr. S. C.* 653.(b) 5 *T. R.* 205.

and

and servant beyond the period of a week ; and if so, it became a hiring unlimited in duration, and therefore was a hiring for a year. And he cited *Rex v. Ham-
preston* (a), and *Rex v. Birdbrooke* (b).

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LORD ELLENBOROUGH C. J. I take the rule of law to be, that if no particular time is expressed for the continuance of the service, or is reasonably to be implied, a hiring for a year is to be intended. But it has also been laid down, that a reservation of weekly wages imports a hiring by the week, unless the inference which arises from the reservation of weekly wages be repelled by other circumstances. Where there is a liberty to part at a month's notice, that imports that as there must be a month to determine the contract, the reservation of weekly wages is not to limit the duration of the contract, and therefore it becomes a hiring unlimited in duration, which the law terms a general hiring or a hiring for a year. What is the case here? The hiring is at weekly wages, except in the harvest month, when the servant is to be paid according to a higher rate of weekly wages during that month; he is to be paid 10s. 6d. per week, the parties contemplating the possibility of the service continuing during the harvest month. If the exception had been "*for* the harvest month," instead of "*in* the harvest month," it might have afforded a more plausible argument that the contract was meant to endure at least for the period of a month ; or if instead of 10s. 6d. a week, it had been stipulated that the servant should receive two guineas for the month, that would have imported a consolidated

(a) 5 T. R. 205.

(b) 4 T. R. 245.

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month, and might have repelled, on the same principle as the month's notice, the inference arising from the reservation of weekly wages; but that is not the language of this contract. All that is stated here is the payment of weekly wages, which according to the cases controls the duration of the contract.

LE BLANC J. I am of the same opinion. The case is perfectly clear. The pauper was hired as a servant in husbandry at weekly wages, which is a weekly hiring, because if there be nothing else to ascertain the duration of the hiring, the payment of the wages shall ascertain it. Is there any circumstance here to shew that the hiring was intended to be for more than by the week? If there be any such circumstance, then it will be a yearly hiring, unless it can be shewn that it was intended to be for a less period. Now the only circumstance is this, that in the harvest month the weekly wages were to be increased, and afterwards reduced. Is that more than was expressed in *Rex v. Dedham*, where the pauper let himself at 6s. a week summer and winter? That was understood if the parties should happen to go on together summer and winter, and so it must be understood here if they should continue until the harvest month. So in *Rex v. Mitcham* (a) a hiring at so much a week for as long time as the master and servant could agree, was held to be a weekly hiring, being a hiring for so long as they could agree from week to week. Here it is in effect so long as the parties can agree, and if they should go on to the harvest month, then from week to week at a higher rate of wages during that month.

(a) 12 East, 351.

2. **BAYLEY J.** There is nothing in this case to shew that the master bound himself to keep the man, or the man to serve the master, for a year. The parties were only providing, that in case the weekly contract should continue up to the harvest month, the weekly wages should be increased. There was no obligation either upon the master or the servant to continue it beyond the week.

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Order of Sessions confirmed. (a)

(b) *Dampier J.* was absent.

**The KING against The Inhabitants of NORTH
DUFFIELD.**

Saturday,
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UPON appeal, the Sessions for the East Riding of the county of York confirmed an order for the removal of *John Barnard*, his wife and children, from the township of *Spaldington* to the township of *North Duffield*, subject to the opinion of this Court upon the following case:

By the 33d G. 3. "for building a bridge over the river *Derwent*," &c., certain persons are constituted a corporation, by the name of the company of proprietors of the *Derwent* bridge, and are empowered to have a common seal, &c. In pursuance of this act a bridge was built over the *Derwent*, called *Bubwith Bridge*, and a house erected, where tolls are collected by virtue of the act. In *February* 1811 the pauper entered into the occupation of this toll-house, and the tolls there re-

Where five persons, as members of a managing committee of a corporation, who were proprietors of a bridge and the tolls thereof, demised the toll-house and tolls to the pauper, for one year, reserving a rent to the corporation and a power of re-entry, but the demise was not under the corporation seal, but only under the seals of the five individual members; held that the pauper did not gain a

settlement by occupying the toll house and tolls above 40 days, and that his having paid rent for the same made no difference, the annual value of the toll-house without the tolls not exceeding 5s.

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ceived, in pursuance of an instrument of that date, by which five persons, therein described as five of the members of a committee appointed for managing and carrying on the affairs and business of the company of proprietors of *Derwent* bridge, demised to the pauper, his executors, administrators and assigns, the toll-house and toll-bar, together with the pontage and tolls, dues, payments and duties arising therefrom, to hold for one year, at the rent of 12*6*l. by monthly payments; and the pauper, together with one *Holtby* his surety, covenanted with the said five persons to pay to the said company, or their treasurer, the said yearly rent, at the several times; and that in default thereof it should be lawful for the company or their treasurer to enter upon the toll-house, &c. and receive the tolls, &c. This instrument was signed and sealed by the respective parties, but the seals of the said five persons were only their private seals, and the corporation seal was not affixed to this instrument. The pauper continued in the occupation of the toll-house and the tolls above 40 days, and paid rent for the same. The toll-house is situate and the tolls receivable in the township of *North Duffield*. The annual value of the toll-house did not exceed 5*l.*, but the annual value of the tolls greatly exceeded 10*l.*, and they were let for 70*l.*

Topping in support of the order of sessions contended that the pauper acquired a settlement in *North Duffield* by the occupation of the toll-house and receipt of the tolls. He admitted that *Rex v. Chipping Norton* (a) decided that an interest in tolls under a parol demise

(a) 5 *East*, 239.

from

from a corporation, which can only demise by deed, would not confer a settlement; but he said that in *Wood v. Tate* (a), which was a later case, it was considered that a demise of lands by a corporation, not under the corporation seal, would entitle the servant of the corporation to avow the taking a distress as upon a demise by the corporation, the tenant having paid them rent. So here, though the company have made the lease, as *Mansfield* C. J. observed in that case, in a blundering manner, it cannot be doubted that they meant to demise the tolls, for the rent as well as the power of re-entry are expressly reserved to them, and the tenant has paid them rent. It follows therefore from that case that the company might have distrained for the arrears of rent under this demise; and if the demise would be good to warrant a distress under it, it seems difficult to conceive why it may not also be good to confer a settlement.

Scarlett and *Coltman* contra, maintained, that *Wood v. Tate*, so far from being in favour of the settlement, was an authority the other way, for there the demise, by reason of its not being under the corporation seal, was held void; but the tenant having paid rent to the corporation for the lands, that was considered as an admission on his part that he held under them. But that cannot be with respect to tolls, which are an incorporeal hereditament, and therefore are not capable of being holden except by deed.

Lord ELLENBOROUGH C. J. The residence in the toll-house, if it had been of sufficient value, might have

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answered the purpose of a settlement, but there the value fails; and the tolls are not things which lie in tenure, but only in grant; therefore without a deed, an interest in them could not pass. In the case cited, putting the lease out of the question, the party admitted a tenancy by the payment of rent.

LE BLANC J. In *Wood v. Tate* the plaintiff in replevin was the party distrained upon, and had paid rent to the very persons by whose authority the distress was made; he was therefore estopped from denying that he held under them. He had acknowledged a holding by the payment of rent.

BAYLEY J. *Wood v. Tate* shews the distinction between land and an incorporeal hereditament.

Orders quashed. (a)

(a) Dampier J. was absent.

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The KING against The Inhabitants of BILLING-
HURST.

A person whose baptismal and surname was A. L. was married by banns by the name of G. S., having been known, in the parish where he resided and was married, by that name only, from his first coming into the parish till his marriage, which was about three years; he contended that the marriage was valid, and therefore the wife and children entitled to the husband's settlement.

THE Quarter Sessions upon appeal confirmed order for the removal of *George Smith*, his wife and children, from the parish of *Salehurst* to the parish of *Billingshurst*, in *Sussex*, subject to the opinion of the Court upon the following case:

The pauper, whose baptismal and sur-name is *Abraham Langley*, and whose legal settlement is in *Billingshurst*

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hurst, was married to his present wife in the parish of *Lamberhurst*, by banns, about four years ago, by the name of *George Smith*. Previously to his marriage he had resided about three years at *Lamberhurst*, during which time, and from his first coming into that parish, and during all the time he remained there, and afterwards until and at the time of his removal, he was known by the name of *George Smith* only. The wife and children have no settlement in *Billingshurst*, unless they have acquired one by the marriage.

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Courthope and *Bowen* in support of the order of sessions contended that the marriage was valid, and therefore that the wife and children were entitled to the husband's settlement. And they argued that the stat. 26 G. 2. c. 33. which directs "a notice in writing of the true christian and surnames of the parties to be delivered to the minister," &c. was well satisfied in this instance by the name of *George Smith*, that being the name by which alone he was known at the place of his residence, and which he had gained by reputation. It cannot be doubted that both by the ecclesiastical and common law a name which a man has acquired by reputation may stand in the place of his true name. In *Frankland v. Nicholson* (a) Sir *Wm. Scott* expressly "states that there may be cases where names acquired by general use and habit may be taken by repute as the true christian and surname of the parties;" and afterwards addressing himself more particularly to the point now in question, "if," says he, "a person has acquired a name by repute, in fact the use of the true name in

(a) See note 1. at the end of the case,

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the banns would be an act of concealment that would not satisfy the public purposes of the statute; therefore I do say that names so acquired by use and habit might supersede the use of the true name." That was a case indeed where the assumption by the wife of a false name being considered as a fraud upon the husband, the marriage was held invalid: and so in a subsequent case of *Pougett v. Tomkyns* (a), where the publication by a false name was a fraud upon the parental rights of the father, the same conclusion was come to. But several other cases in the same court have decided that the want of a strict adherence to the real name, if there be no fraud, and especially if the party has acquired a name by reputation, will not vitiate the marriage. (b) Considering also the question as it stands at the common law, it will be found that the marriage act is only confirmatory of the ancient law, as it stood upon the 25 H. 8. and the Canons. The marriage act confines the publication of banns to three *Sundays*, which before that might have been on three holidays (c), the object of which was to secure notoriety. Now that object has been attained in this instance in the best manner possible by the publication of the acquired name, for in the words of Sir W. Scott, the use of the true name would have been an act of concealment, the acquired name having superseded the use of the true name. Somewhat analogous to this is the plea of misnomer of the defendant, in which it is usual for the defendant to plead not only that he was baptized by the name, but that he hath always been known by it, and to negative that he was ever known by the name of suit, and the plaintiff may reply that he

(a) See note 2. at the end of the case.

(b) See note 3. at the end of the case.

(c) Canons, 1603. Can. 62. See *Gibbs* 511.

is known by the one name or the other. And according to Holt C. J. in *Holman v. Walden* (a), to say that he was baptized, without saying, and known by such a name, is not sufficient; "one may have," said he, "a nomen and cognomen, who was never baptized. Also he thought it could not be a sufficient answer for the defendant to say he was baptized by the name of A., without averring also that he was ever called and known by that name." So *Co. Lit.* 3. sheweth that a grant may be good, though it be not by the name of baptism or surname, if it be by a known name. Again, 2 *Roll. Abr.*, *Graunt B.* "if a man be baptized by the name of J. and is known by another name, if he grant by that name by which he is known, it is good." Here the statute does not make the banns void, except in one instance, viz. where the parents or guardians forbid them (b); and though it enacts that all marriages solemnized without publication of banns shall be void (c), that may mean, as in the case of the statute of apprentices (d), voidable by the parties themselves, but not void for collateral purposes, such as a settlement, where the parties themselves do not complain.

D'Oyly and *Long* contra, after observing that doubts were entertained at the Commons upon the validity of this marriage, contended that it was void, by reason that the banns were not published in the true christian and surnames, but more especially in the true christian name, of the party. And first as to the argument that the marriage act had for its object to insure notoriety to the marriage, and that if that was attained the purposes

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(a) *Salk.* 6.(b) *S.* 3.(c) *S.* 8.(d) 5 *Eliz. c. 4* s. 41. See *Rex v. St. Nicholas*, *Burr. S. C.* 91.

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of the act would be satisfied, they answered, that if that were so, then it would be enough if publication were made by any description by which the party is generally known, without naming him, such as his name of office, or as parson or lord of such a manor or parish. But the statute is precise that it shall be in the true christian and surnames. Perhaps a different consideration may be due to each of these, for according to *Co. Litt.* 3. "a man may have divers names (i. e. surnames) at divers times, but not divers christian names." And the reason of this seems to be, that the surname probably originated in some accidental circumstance of property, person, or occupation, peculiar to the individual, which therefore might vary with circumstances. But the christian name being imposed at his baptism, by a solemn act inseparably connected with his religion, could not be changed except at his confirmation, in which case, as was resolved by all the Judges in Sir *F. Gawdy's* case, he shall afterwards use his name of confirmation (a). So in *Com. Dig. Abatement*. E. 18. (b) it is laid down, "that the defendant shall plead misnomer of the plaintiff if his christian name be mistaken, though he be known by the name by which he sues, for he can have but one name of baptism, and ought to sue by his true name." But it is otherwise with respect to his surname. *ibid.* E. 19. And this may be set against the supposed dictum of Lord *Holt* in *Holman v. Warden*, and is in concurrence with the authorities above quoted. Whatever may have been the ancient law before the marriage act, it will be found that since that time the rule of the ecclesiastical court has been to enforce a rigid observ-

(a) *Co. Litt.* 3. 2 *Roll. Ab.* 135. (b) See also *Bac. Ab., Misnomer*, B.

ance of the forms prescribed by the act, insomuch that in one case the Court felt itself compelled, though there was no ground to suspect fraud, to hold the marriage void, because the banns were published on *Christmas day* instead of *Sunday* (a). And in *Pougett v. Tomkyns*, though much certainly turned upon the fraud, it is difficult to conceive that it was the only ground of decision, because if it were, it was allowing one of the parties to avail himself of his own fraud to avoid the marriage. *Frankland v. Nicholson* was a mixed case, not altogether resting on the fraud, but partly also on a general view of what the statute intended by the rules which it prescribed; and Sir *W. Scott* said, "that he did not hold it to be necessary that there should be actual fraud on the individual party; it was enough if the thing led to a probability of fraud." Accordingly *Mather v. Ney* (b) is an express decision that, in the absence of any circumstance of fraud, if from mere levity, as it was there said, the publication of banns be in a wrong name, the marriage is void ab initio. Here the publication of banns, admitting a surname by repute to be well enough, was for the reasons above alleged in a wrong christian name, and it is an inference of law that that was for the purpose of concealment; or if it be necessary to shew fraud in fact, here, it may be said, if the publication had been in the real name of this pauper, it must have awakened suspicion; and led to inquiries how it happened that a man who was known by one name should have the banns published in another. As to the argument that this marriage is not void but only voidable by the parties, it is

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(a) The name of this case was not mentioned.

(b) See note 3. at the end of the case.

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sufficient to answer that the statute has expressly enacted that all marriages without publication of banns shall be null and void, and a publication of banns in a wrong name is as if there were no publication. And though the statute relating to apprentices has been held to mean that the indentures shall be voidable only, that was because the statute made them void for the benefit of the parties, which benefit they may waive if they please, but this act is made against both parties. (a)

Lord ELLENBOROUGH C. J. All that the law requires on this subject is, that marriages shall be solemnized either by licence, or publication of banns, otherwise the stat. 26 *Geo.* 2. c. 33. s. 8. declares that they shall be void. The statute does not specify what shall be necessary to be observed in the publication of banns; or that the banns shall be published in the true names; but certainly it must be understood as the clear intention of the legislature that the banns shall be published in the true names, because it requires that notice in writing shall be delivered to the minister of the true christian and surnames of the parties seven days before the publication; and unless such notice be given he is not obliged to publish the banns. The question then is, has there been in this case, that which is required, a due notification by the minister, on a *Sunday* in time of divine service, of one of the persons intending to contract marriage. Now it appears that such notification has been made by the name of *George Smith*, by which name alone the party was known in the place where he resided, and which he had borne for three years prior

(a) Per Lord Mansfield, in *Chilham v. Preston*, *Burr.* 3. C. 486. 1 *BL. Rep.* 192.

to the celebration of the marriage, in that place, and that he was not known there by any other name. It would lead to perilous consequences if in every case an inquiry were to be instituted, at the hazard of endangering the marriage of a woman, who had every reason to think she was acquiring a legitimate husband, whether the name by which the husband was notified in the banns were strictly his baptismal name, or whether at the period of his baptism he may not have received some other name. What the consequences might be of encouraging such inquiries, as to the avoiding of marriages, and bastardizing the issue of them, it is not very difficult to imagine. The object of the statute in the publication of banns was to secure notoriety, to apprize all persons of the intention of the parties to contract marriage; and how can that object be better attained, than by a publication in the name by which the party is known? If the publication here had been in the name of *Abraham Langley*, it would not of itself have drawn any attention to the party, because he was unknown by that name, and its being coupled with the name of the woman who probably was known, would perhaps have led those who knew her, and knew that she was about to be married to a person of another name, to suppose either that these were not the same parties, or that there was some mistake. Therefore the publication in the real name, instead of being notice to all persons, would have operated as a deception; and it is strictly correct to say, that the original name in this case would not have been the true name within the meaning of the statute. On these grounds I think that the act only meant to require that the parties should be published by their known and acknowledged names, and to hold

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a different construction would make a marriage by banns a snare, and in many instances a ruin upon innocent parties. The Court therefore cannot lend itself to a construction which would be pregnant with such consequences:

LE BLANC J. This question comes before the Court under circumstances which strip it of any thing like fraud. The pauper who was known in the parish by the name of *George Smith* only, is notified to the minister by that name, and the banns are regularly published in that name in the parish church. And the objection is, that the marriage is null and void, because the name of *George* is not the true name by which he was baptized, and because *Smith* is not his true surname; wherefore it is argued that this was a marriage without publication of banns. It is material to look to the marriage act in order to see in what way it directs the banns to be published. The only clause which directs the true christian and surnames to be used is the second, and that has reference to the notice to be given to the minister; it requires that a notice in writing shall be delivered of the true christian and surnames of the persons to be married. A subsequent clause (s 8.) forbids any person to solemnize marriage without publication of banns, unless by licence, under the pain of being adjudged guilty of felony, and provides for the punishment of persons who shall so do; and then it concludes "that all marriages solemnized without publication of banns or licence shall be null and void to all intents and purposes." To be sure the argument here must necessarily be, that a marriage by banns which are published not in the true christian and surnames of the parties,

parties, is a marriage without publication of banns. But I cannot accede to that argument, recollecting what was the object of this provision in the marriage act. The object of it was to insure notoriety to the transaction, and I think, the Court recollecting that, cannot say that a marriage by banns, published in the names by which alone the party was known, is a marriage without publication of banns. The argument is, that a marriage by publication of banns means by publication of banns in the real names of the parties only; but the statute has said no such thing. If the banns be published in the names of the party by which alone he is known, and there is no fraud, whether that be the true christian or surname of the party or not, I think the marriage is good within the meaning of the statute. Therefore I am of opinion that upon the present occasion every thing was done that was sufficient to give that notification of the marriage which it was the object of the marriage act to insure.

Per Curiam (a), Order of Sessions confirmed.

(a) *Dampier J.* was absent.

NOTE, No. 1.

The following is a Minute of the Sentence delivered By Sir *William Scott* in the case cited.

Consistory Court of London, Wednesday, May 29, 1809.

FRANKLAND against **NICHOLSON**, falsely calling herself **FRANKLAND**.

THIS is a proceeding for nullity of marriage, which is admitted to have been had in effect between *Anthony Frankland* and *Ann Nicholson*, on the ground of an improper publication of banns, she having been described in the banns by the assumed name of *Ross*. This suit is founded upon the marriage act, which directs that there must be a publication of the true christian and surname of the parties. I think proper to observe, that the rule to be applied to it, if it had rested upon the old ecclesiastical law of the country, would be the same as if

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no marriage act had subsisted. By that law the publication of banns is necessary; marriage is a contract by which the relation of parties to the public is materially altered; it is a contract which is to be entered into by the parties with all public notoriety, and which is to be performed in a public place. The high importance of this contract has required by the known law of the country, and every christian country, that there shall be a publication of banns, to give validity to a contract *sui generis*. The word "banns," in the old *German* language, signified a publication, meaning that there should be a previous notification generally to the world, that all persons may have notice that such and such persons are going to be married. This condition is never relaxed but by dispensation in the way of licence. If this be so, what is the publication the law requires? I think nothing can be more clear than that the publication should notify, what it is fit the world, for public purposes, should know, that such persons are going to enter into that state and condition of life. A publication that *A.* and *B.* were going to be married, when in fact it was *C.* and *D.*, would be a nullity in itself, and consequently a marriage grafted upon it must be a nullity likewise; and though later times have introduced a very relaxed practice, yet by the known law of the country it requires a publication by banns, at least where not dispensed with by the ordinary, which the statute law reaffirms and strengthens. Now it has been argued that the true and proper christian and surname of the party cannot be altered but by proper authority, by the king's licence, or an act of the legislature: yet there may be cases, where names acquired by general use and habit may be taken by repute as the true christian and surname of the parties. If a person has acquired a name by repute, in fact the use of the true name in the banns would be an act of concealment, that would not satisfy the public purposes of the statute; therefore I do say that names so acquired by use and habit might supersede the use of the true name; and if this case came up to this requisition, I should think the party entitled to have the marriage affirmed. The statute has prescribed several rules, and this by publication of banns of the true christian and surname of the parties, for the purpose that every person may be informed what is going to pass. The public at large, the relations, the parties themselves, have an interest in it; until the marriage is solemnized there is a *locus poenitentiae*. They may receive very important information of the conduct and character of the parties, who are going to enter into this contract for life: there may be persons well acquainted with the particulars, whether of his or her conduct, which may alter the resolution of either of the parties themselves. In this particular case, suppose the party had been described by her own proper name, there might have been persons acquainted with her conduct, which might have influenced, and fairly influenced the party himself; therefore the publishing, not in the true name, deprives him of that information which he has a right to possess. I do not hold it to be necessary that there should be actual fraud on the individual party; it is enough if the thing leads

to a probability of fraud; and this mode of conducting the matter would lead to such consequences and mischief, as it is the intention of the legislature to prevent. It seems to me that courts of justice are only following up that intention in preventing such modes as are so obnoxious, and lead to fraud: certainly if this mode was permitted, a man might be married to the wife of another person without the slightest knowledge of the fact; and many instances might be put in which a liberty of this kind would be extremely grievous. And in all those cases, where a false name is assumed for the publication of banns, it may be considered as an imposition on the party himself: it may prevent him from having that information which ought to be open to him, up to the very time when the contract is pronounced irrevocable. If the fact had come out that the woman had grossly misrepresented her condition and state of life, it might have altered the intention of the party, with respect to this marriage; therefore, if the woman has been guilty of practising this fraud, and imposing upon the man with respect to her condition (holding even possible fraud in this case) it is enough. But in this case there is a fraud practised; there was an assumption of the name of *Ross* in such a way, as will justify the Court in holding, that it had not superseded the other name, and that it was this very person that was going to be married. One would rather have expected witnesses would have been called to establish the fact, that in the district in which this woman lived, such was the name by which she generally passed, either by Miss or Mrs. *Ross*, as she thought proper to describe herself; but nothing of that appears; it is left to the testimony of the sister and brother of the party. The sister says that about two years and a half ago she met her sister in the street by accident, not having seen her for two or three months preceding, and inquired of her where she lived, and she told the deponent she lived at No. 19. *Portugal-street, Clare-market*; saying, if deponent called upon her she must ask for Mrs. *Ross*; that deponent soon after did call at No. 19. *Portugal-street*, and inquired for Mrs. *Ross*, and was accordingly introduced to her said sister, who on that occasion said she had accidentally met with a gentleman who wanted to have her. I cannot collect from this any thing more, than that at the house where she lived she was known by that name; it is too much to conclude from this that she bore it till marriage. But the gentlemen say, down to the marriage she did actually go by that name. But there is an interrogatory (which I presume the gentlemen did not read) to this effect, "that the ministrant, for long time before the marriage between her and the producent, passed as his wife, and went by the name of *Frankland*," therefore she was cohabiting with this man for some time before the marriage. I think there is not proved such a use of the new name, as comes up to the requisition of the statute. The statute requires the true christian and surname, and unless there be a publication to that effect it cannot be qualified, the marriage must be pronounced null and void. I do not know that it is necessary to shew a particular fraud in

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each case; but here is a fraud practised on the party as to the condition and situation of the woman; likewise a fraud upon the public, being in violation of the law, and also a fraud upon the officiating minister, whose duty it is to inquire into the requisites, whether the parties are living within the parish. I am, therefore, of opinion that this marriage is not a legal one, and must be pronounced null and void.

NOTE, No. 2.

Consistory Court, Jan. 1812.

POUGETT v. TOMKYNs, falsely calling herself POUGETT.

THIS was a suit for nullity of marriage, by reason of publication of banns by a false name of one of the parties who was a minor.

It appeared that *William Peter Pougett*, a minor under 16 years of age, was married to *Letitia Tomkyns*, his father's maid-servant, and that the banns were published, and the marriage celebrated, in the names of *William Pougett* and *Letitia Tomkyns*, whereas the real name of the minor was *William Peter Pougett*. It farther appeared that he was generally known and addressed by the name of *Peter* only, and that very few people were acquainted with the fact that he had likewise the christian name of *William*. The marriage took place in the church of *St. Andrew's, Holborn*, in which parish the parties had never resided.

Judgment. Sir W. SCOTT. This is a suit brought by *Joseph Pougett Esq.*, father of *William Peter Pougett*, a minor, to annul the marriage which has taken place between his son and *Letitia Tomkyns*, on the ground of minority and want of consent, and undue publication of banns. *William Peter Pougett*, the son, was born at *Surat* in the *East Indies* in *May 1794*, and the marriage is proved to have taken place in *January 1810*, consequently he was at the time under 16 years of age. It is proved, also, that the son resided in the house of his father in the parish of *St. Mary-le-bone*, and that the marriage was solemnized in the church of *St. Andrew's, Holborn*. The alleged wife, it appears, was a servant in the family; what her age might have been, does not appear from the evidence before the Court, but the letters which have been exhibited shew that she was a very uneducated person. It is proved that the young man was christened *William Peter*, but that he was addressed by the name of *Peter* only; and that nobody, except his near relations, knew that he had the name of *William* also. His own letters were commonly subscribed *Peter* only, though some of them are signed *Peter W. Pougett*. *Letitia Tomkyns*, the party against whom the suit is brought, always called him *Master Peter*, and he is so addressed in her letters to him; so that nothing can be more clear, than that although *William* formed a part of his baptismal name, yet the other obliterated it in common use. The name of *William* would not have sufficed to designate him to most persons, and this is certainly a most important incidence in the present case. In what manner the marriage was brought about does not exactly appear. An

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attempt, it seems, was made to have the banns published at *Highbate*, which miscarried, as one of the witnesses, who was employed by the minor to obtain the publication, states, because the clerk did not believe that the parties were resident in *Highbate*. It has been said that the business of obtaining publication of the banns having been entrusted to this witness by the minor himself, shews that there was no fraud upon him on the part of the wife: but the fraud suggested in this case is not a fraud upon the boy himself, but upon the parental rights of the father, his natural guardian. The account which the witness who was present at the marriage gives, is this, that the clergyman asked the minor his name and residence; that he answered his name was *William Pougett*, and appeared to be much confused; that the brother of the woman answered as to the residence. He is, therefore, I think, to be taken as the principal actor in the business, though the fact that he was so is not directly stated by the witness. It is proved that the banns were published and the marriage celebrated in the names of *William Pougett*, (omitting the word *Peter*), and *Letitia Tomkyns*, and it is likewise proved that the father was totally ignorant of the marriage at the time, and that he was not informed of it till some months afterwards, when he expressed great regret and indignation at what had occurred. The act of parliament recites great inconveniences having arisen from clandestine marriages, and professes to prevent them for the future. For this purpose it directs a notice in writing of the true christian and surnames of the parties to be delivered to the minister seven days before, and without such notice he is not obliged to publish the banns. *It must be taken as the clear intention of the legislature that the banns are to be published in the true names though it is not so expressed in the statute.* What is the use of publication of banns? Why to notify to all persons the intention of the parties to marry, and if the true names are not used then is there no notification whatever. There is no opportunity given to any persons who may be interested of knowing what is about to take place or of alleging any impediment to the marriage. It has, therefore, always been held in these courts from the case of *Early v. Stevens* to the present time, that a publication of banns in false names is no publication at all. To hold the contrary would be to hold that which is contrary to the statute and to common sense. The question then in this case is, whether the omission of part of the christian name is so material a variation as to nullify the publication. The true name is *William Peter*, and strictly speaking all baptismal names should be set forth, for in strictness I conceive that all the names compose but one christian name. And I understand that it is so held in courts of common law. In the publication of banns, then, all the names ought to be published, for they all make up but one name. The party may be known to some by one name, by another to others; it is, therefore, highly proper that all should be enumerated. But I should be afraid to go the length of saying that the publication would be vitiated by the want of this in all cases. Where no fraud is intended on either side, where all the parties interested have been cognizant, and where there has been a mere accident

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tal omission of a dormant name, it would be too much to hold that a marriage, perfectly honest in other respects, should be vitiated by such an omission. Another case may be put, where either of the parties fraudulently suppressed one of the christian names without the knowledge of the other; it would in such a case be hard to hold the marriage void against the ignorant party. But where the omission was known to both parties, and intended by them as a fraud upon a third person, the father or guardian, the Court would, I think, in such a case, be bound to enforce the strict letter of the law in order to maintain the spirit of the law. It has been said that the statute provides that it shall not be necessary after the marriage has been solemnized to give any proof of the abode of the parties within the parish, and that no evidence shall be received to prove the contrary in any suit respecting the validity of the marriage; but this tends rather to shew that other points may be enquired of, and that the validity of the marriage may be questioned on other grounds. Thinking, therefore, that the Court is called upon to act on these principles, I have to consider the evidence which is before me, and to enquire whether this is a case of *casual omission* or of *fraudulent suppression*. If one of the christian names has lain dormant, and that name be omitted in the publication of banns, we may fairly presume that the omission was accidental. But here the name has been omitted by which the young man was usually known, by which he was always addressed in the family, and even by this woman herself in her letters. The Court, therefore, can entertain no doubt that the omission was intentional, and that it was made for the *purpose of concealment* from the father. It is a very strong circumstance, indeed, that *the dormant name is brought forward, and the name by which the party was universally known suppressed*. At the time of the marriage, the clergyman questions the young man as to his name and place of residence, to which he replies that his name is *William Pougett*, and appears much confused; the woman's brother then comes forward, not to tell the truth, but to give evasive answers, for the purpose of deceiving the clergyman and preventing the postponement of the marriage. The banns of marriage were published in the church of *St. Andrew's, Holborn*, and it is pleaded that the parties resided in the parish of *St. Mary-le-bone*. This part of the plea was objected to by counsel as contrary to the 10th section of the statute, to which it was answered, that it was used only as a circumstance to shew fraud, and not for the purpose of invalidating the marriage on the ground of non-residence within the parish. The words of the act are very broad and positive, and it was not without considerable hesitation that the Court permitted this part of the libel to stand. The doubts which the Court then entertained are not now removed, and if the question in any degree turned upon this part of the case I should feel great difficulty in deciding it. But here is another fact pleaded to which the same objection does not apply, namely, the attempt to get the banns published at *Highgate*. Upon the whole, then, this is not a case of mere inadvertence or casual omission; it is not a case of fraud by one party on the other; but it is a confederation of both against the rights of the father, and therefore I pronounce the marriage null and void under the statute.

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NOTE, No. 3.

The following are extracts from the minutes of some of the cases in the Consistory Court here alluded to.

Consistory Court, July 10th, 1807.

MATHER v. NEY.

THE real name of the woman was *Ney*, and the banns were published in the name of *Wright*.

Per Curiam. This is a proceeding to obtain a declaratory sentence of nullity of marriage on account of publication of banns in a wrong name. The proof of this fact is full. No reason is given for it, it seems to have been from mere unthinking levity. No circumstance of fraud is suggested: no imposition was necessary to be practised. The question is, whether under the statute, and the construction which has been put upon it, this marriage must be pronounced void ab initio. The parties cohabited together as man and wife, were reputed such, the children were baptized not as children of the husband and wife, but as of the mother by her maiden name. If the marriage be void ab initio, no length of time can render it valid. The act requires a publication of banns. In common reason it must be supposed to require the true names, if not the true names, then it is no publication at all. The intent of the publication must be to give notice that the marriage is to be solemnized between the parties. Whether a name acquired by reputation might have sufficient legal effect is a question different from the present. If the evidence before me brought the present case to that point, it would be my duty to determine it upon that. This point, I believe, has not hitherto been decided. But on the other facts the decisions have been uniform, namely, that banns must be published by the names of the parties. It was, indeed, stated, that the woman had used the name by which the banns were published, and that a witness might have been called to prove this. But her own sister is examined, and does not say any thing of the matter. And no foundation is laid for calling further evidence to prove this fact. If there had been, I should have thought it necessary for the protection of the children to have called for this evidence. Upon the whole, I shall pronounce the marriage void ab initio.

Consistory Court, May 17th, 1812.

HEFFER v. HEFFER.

THIS was an objection to the admission of a libel in a suit for the restitution of conjugal rights brought by the wife.

Sir W. SCOTT. The objection principally relied on arises upon the copy of the parish register which is exhibited. The libel pleads that the parties were married by virtue of banns duly published. The

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woman's real name it appears was *Anna Colley*, but in the exhibit it is stated that *George Heffer* and *Anna Sophia Colley* were married, and hence it has been inferred by the counsel that the banns were so published, and that the marriage is invalid on the ground of undue publication. Now it does not necessarily follow that the banns were so published. It may be a mere mistake of the minister in giving the certificate; it may be that the banns were published by the right names, and that the additional name was used only at the celebration of the marriage. But admitting that the banns were published with the additional name, still if no fraud be shewn, if there be no doubt as to the identity, the Court would be very unwilling to question the validity of the marriage after the long cohabitation of the parties, under the constant acknowledgment of each other as husband and wife. This case differs very materially from that of *Pougett v. Tomlyns*, which has been cited. That was a case of clear fraud against the rights of the father. If the husband can shew that he has been imposed upon by a false name, he may upon that ground falsify the marriage, but he must set forth the fraud, and prove it to the satisfaction of the Court. I shall admit this libel.

Consistory Court, *May* 29th, 1812.

TREE, otherwise QUIN, v. QUIN.

THIS was a suit for nullity of marriage brought by the father of a minor by reason of publication of banns by a false name of one of the parties. One of the articles pleaded that the woman was baptized by the name of *Martha*, and that she was known by no other, and that the banns were published in the name of *Martha Caroline*.

Per Curiam. Do you contend that this would be sufficient to annul the marriage without shewing fraud?

Swaby. In clandestine marriages, which the act was passed to prevent.

Per Curiam. I shall admit the libel, but without determining the law of the case till I see what is proved as to fraud.

It does not appear that any further proceeding was had in this case.

Consistory Court, *June* 9th, 1812.

MAYHEW v. MAYHEW.

THIS was a proceeding on the part of the husband for divorce by reason of adultery. The wife in a responsive allegation denied that any legal marriage had taken place, and the case came before the Court on the admissibility of this allegation. It was pleaded that in the publication of banns the woman was described as *Sarah Kelm widow*,

widow, but that her name was not *Kelso*, and that she was not a widow.

The woman had gone by several different names, her maiden name was *Sarah White*, or at least so stated by her to *Mr. Mayhew*. She had passed by the name of *Aikin*, but was generally known by that of *Kelso*, being the supposed widow of a person of that name.

The Court said that there was no fraud on any one, the husband having been previously made acquainted with all the circumstances. The woman was a major, and there was no person on whom fraud could operate. Neither the act of parliament nor the rubric require a description of the status of the parties, and therefore the circumstance of her having been described as a widow is not material. The facts if proved would not affect the marriage; the allegation must, therefore, be rejected.

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MAYHEW
against
MAYHEW,

BARKER against HODGSON.

Tuesday,
Nov. 22d.

COVENANT; the plaintiff declares on a charter-party of affreightment made between him as master of the brig *Providence*, and the defendant, as freighter, upon a voyage to *Gibraltar*, there to deliver the outward cargo, and having so delivered to take on board from the agents or assigns of the freighter at *Gibraltar* and *Cadiz*, both or either, or at *Gibraltar* and *Malaga*, both or either, as should be ordered by the freighter or his agents, a homeward cargo, and deliver the same at *London*, &c. for which 60 running days were allowed, and that the defendant covenanted that he, his agents or assigns at *Gibraltar* and *Cadiz*, both or either, or at

The charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though in consequence of the prevalence of an infectious disorder at the port all public intercourse is prohibited by the law at the port, and though he could not have communication

without danger of contracting and communicating the disorder; therefore where to covenant for not sending a cargo alongside at *Gibraltar* defendant pleaded that a pestilent and infectious disorder prevailed there, and thereupon all intercourse was prohibited by the law of the place, and became impracticable, without imminent danger to the persons concerned, of contracting and communicating the same, and defendant was prevented from sending alongside during all that time, of which plaintiff had notice, and thereupon departed with his ship on her return: replication, that defendant might have sent the cargo alongside before all intercourse became unlawful or impracticable, but refused, and thereupon plaintiff departed with his ship by the consent of defendant's agent: held that defendant was liable.

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Gibraltar and *Malaga*, both or either, should and would, at his or their own costs and charges, send the said homeward cargo alongside the ship, and assigns a breach in the terms of that covenant; per quod the plaintiff was prevented from taking on board the said homeward cargo, and obliged to return home without any cargo.

Pleas, 1st, that after delivery of the outward cargo at *Gibraltar*, and before the expiration of the 60 running days, a certain pestilent and malignant disorder broke out and prevailed there, and thereupon all such public intercourse and communication as was necessary for the purpose of sending the homeward cargo alongside the ship, became and was, and until the discharge of the plaintiff as thereafter mentioned continued to be, unlawful and prohibited by the then public and established law of the place, until farther regulations, so that the defendant or his agents could not send the same alongside, without violating such law; whereof the plaintiff had notice, and was then and there discharged by the agent of the defendant from the farther performance of his contract. 2dly, That after the delivery of the outward cargo as aforesaid, and before the expiration of the 60 running days, a certain pestilent, malignant and infectious disorder broke out and, prevailed at *Gibraltar*, and thereupon all such public intercourse and communication as was necessary for the purpose of sending the homeward cargo alongside, became and was, and until the discharge of the plaintiff as thereafter mentioned continued to be, impracticable, without great and imminent danger, to the persons concerned therein, of contracting, or communicating the said disorder, and the defendant and his agents were then and there prevented, during all that time,

time, from so sending the said cargo; of which the plaintiff had notice, and was then and there discharged, &c. as before. And there were two other pleas respectively similar to the two above stated, except that instead of alleging that "all public intercourse, &c. became and was, and until the discharge of the plaintiff continued to be, unlawful, &c. and impracticable," &c. they alleged that "all public intercourse, &c. became and was, and until and at the departure of the plaintiff as thereafter mentioned continued to be, unlawful, &c. and impracticable," &c.; and instead of concluding that "the plaintiff had notice thereof, and was then and there discharged," &c. they concluded that "the plaintiff had notice thereof, and thereupon departed with his ship on her return to *London*."

Replications to the two first pleas stated in substance, "that before the breaking out of the said disorder, &c. the ship had delivered her outward cargo, and staid a long time, to wit, ten days, for the purpose of receiving the homeward cargo; and that before all communication became unlawful, or was impracticable, the defendant could, and might, and ought to have sent the homeward cargo alongside, &c., but the defendant did not nor would during that time, nor at any time afterwards, send the same alongside (although often requested) but wholly refused;" and the replications to the two last pleas added, "and thereupon the plaintiff by and with the licence and consent of the defendant's agent departed," &c. And upon demurrer, and joinder, the doubt was, if the matter alleged in the pleas was sufficient to excuse the defendant for the non-performance of his covenant.

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Littledale contended that the matter was sufficient, and especially upon the two latter pleas, which were not pleaded in discharge of the covenant, but only as a suspension of it; and he compared it to the case in 1 *Roll. Abr.* 450. *pl.* 10. “If a man covenant to build a house before such a day, and afterwards the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant for not doing thereof before the day, for the law will not compel him to venture his life for it, but he may do it after.” So here, the covenant was suspended, and the defendant excused from sending the cargo alongside during the time of the pestilence, and if the plaintiff thereupon departed with his ship by the consent of the defendant, he cannot complain that the defendant did not afterwards send it. Then if the defendant is excused from performing the principal thing, he shall also be from the consequences of not doing it.

Lord ELLENBOROUGH C. J. Perhaps it is too much to say that the freighter was compellable to load his cargo; but if he was unable to do the thing, is he not answerable for it upon his covenant? Is not the freighter the adventurer, who chalks out the voyage, and is to furnish at all events the subject matter out of which freight is to accrue? The question here is, on which side the burthen is to fall. If indeed the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events

which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it (a), but must answer in damages.

Per Curiam (b), Judgment for the Plaintiff.

Scarlett was to have argued on the other side.

(a) See 2 *Vern.* 212. and *Blight v. Page*, 3 *B. & P.* 295. n. a.

(b) *Dampier J.* was absent.

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DOE, on the Demise of BURRELL, against
PERKINS. *Tuesday,*
Nov. 22d.

EJECTMENT for a close of land at *Gedney* in *Lincolnshire*. At the trial before *Thomson B.* at the summer assizes 1813, for that county, a verdict was found for the defendant, subject to the opinion of the Court upon the following case:

David Burrell being seised in fee of the said close, by his will dated the 14th of *January* 1776 devised it to *M. Griffin* for life, and after her death to *R. Burrell* in fee. The testator died soon afterwards, and *M. Griffin* entered into possession, and leased the said close to the defendant's father for her life, under which lease the defendant's father held it as tenant to *M. Griffin* till her death. *M. Griffin* died in 1799, and the defendant's father continued in possession afterwards, until his death on the 12th of *November* 1805, without paying rent or having any demand or claim made upon him for rent or for the land, and upon his death the defendant took possession, and has continued in possession

Tenant for life, remainder to *R. P.* in fee, and tenant for life leases for her life and dies in 1799, and lessee continues in possession without paying rent till his death in 1805, when his son takes possession, and continues without paying rent, and 1807 levies a fine with proclamations: held that the heir of *R. P.*, the remainder-man, might maintain ejectment against the son without an actual entry to avoid the fine, or a notice to determine the tenancy.

ever

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ever since, without paying rent or having any rent demanded of him. The defendant's father made a will, and appointed the defendant his executor; and after disposing of some of his property to his grandsons, devised the residue in general terms to the defendant. In *Hilary* term 1807 the defendant levied a fine of the close, with proclamations, and declared the uses of it by deed. The lessor of the plaintiff is heir at law of the testator, and also of *R. Burrell*, who died about 30 years ago. No actual entry was made by the lessor of the plaintiff before the bringing of this ejectment.

The question is, whether the plaintiff is entitled to recover; if he is, a verdict to be entered for him; if not, the verdict to stand.

Reader for the lessor of the plaintiff made two questions, the first upon the effect of the fine levied by the defendant; the second, upon the want of actual entry before ejectment. And he contended that the fine had no operation, and that an actual entry was unnecessary. First, the fine was merely void, being levied by a party who had not any freehold. In order to levy a fine of lands, some one of the parties to it must have an estate of freehold. *Sheph. Touch.* 14. is decisive upon that point: "If neither the conusor nor conusee be seised of any estate of freehold, in possession, or reversion, of the lands whereof the fine is levied, at the time of levying the same, but have only a lease for years, or not so much, the fine is void and of no force as to any stranger, howsoever it may be good between the parties by way of estoppel." Now here it will hardly be denied that the defendant had not any freehold of right, neither had he a tortious freehold by disseisin, or intrusion:
 for

for disseisin is where there is a wrongful putting out of him who is actually seised of the freehold; intrusion is by a wrongful entry where the possession is vacant; *Co. Litt.* 277. *a.* 153. *b.* *Cro. Car.* 303. Again, *Litt. sect.* 279. describes disseisin to be "properly where a man entereth into any lands or tenements, when his entry is not congeable, and ousteth him which hath the freehold." And Lord *Coke* in his Commentary upon that (181. *a.*) notes, "that every entry is not a disseisin, *unless there be an ouster also of the freehold*; and therefore, he says, *Littleton* doth not set down an entry only, but an ouster also, as an entry and claimer, or taking of profits," &c. From all which it follows, that here being neither entry nor ouster by the father of the defendant, he acquired no freehold by disseisin or intrusion. But by reason of his continuing in possession after the death of *M. Griffin* he became tenant by sufferance. This appears by the distinction taken in *Co. Lit.* 57. *b.* between tenant at will and tenant by sufferance, where it is said that "tenant at sufferance entereth by a lawful lease and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawful demise, and after his estate ended continueth the possession, and wrongfully holdeth over." So here the father of the defendant at the first came in by lawful demise from *M. Griffin*, but after his estate ended by her death he wrongfully held over. And the son acquired no better estate than the father. 2dly, It follows from what has been already shewn, that an actual entry was unnecessary in this case. For although an actual entry is necessary to avoid a fine with proclamations, that is only where the person who has the right would be barred by non-claim for five years. If therefore five years non-

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claim would be no bar, which it would not be if the fine, as it has been shewn, operates nothing, neither can an entry be necessary. For an entry is only necessary to revest an estate which has been divested, *Margaret Podger's case* (a), *Saffyn's case* (b), and *Focus v. Salisbury* (c); but here nothing was divested, *causâ quâ supra*.

Gaselee contrà agreed that the father of the defendant, inasmuch as he came in by right and continued by wrong, was not a disseisor, or at least that the lessor was not bound to consider him as such. But here he said was a descent cast which took away an entry, and for that he cited *Rouse's case* (d), which refers to 18 *Ed.* 4. 25. but he admitted that 18 *Ed.* 4. had been overruled in *Allen v. Hill* (e). As to the want of entry, he argued that in all cases of a fine with proclamations an entry is necessary to avoid it, and it is only where the fine is at common law, as in *Jenkins v. Prichard* (f), or where the proclamations have not been made at the time of ejectment brought, as in *Doe v. Watts* (g), that an entry is not required. But granting that an entry was not necessary, and that the defendant was no more than tenant by sufferance, still he is entitled to hold until something be done to determine the tenancy; he is as much tenant as a tenant at will, and according to *Right v. Beard* (h) the bringing the ejectment is not a determination of the will, although the tenant enter into the common consent rule. Therefore, for want of some

(a) 9 *Rep.* 106.(b) 5 *Rep.* 123. b.(c) *Hardr.* 400.(d) *Owen*, 28.(e) *Cro. Eliz.* 238. S. C. 3 *Leon.* 153.(f) 2 *Wils.* 45.(g) 9 *East*, 17.(h) 13 *East*, 210.

notice

notice or act to determine the tenancy, this ejectment cannot be maintained.

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LORD ELLENBOROUGH C. J. It seems that in order to constitute a title by disseisin there must be a wrongful entry; but here has been no wrongful entry, but only a wrongful continuance of the possession, therefore there was no disseisin. With respect to a descent cast, it is not even stated that the defendant is heir. And as to the want of entry to avoid the fine, it surely needs not much labour to discover that if the fine operates nothing it cannot require an entry to avoid it. Nor was any notice necessary before the bringing of this ejectment, for the defendant is not in the ordinary sense tenant, but a person who retains possession of land by wrong against the party in whom the right is, who for a time has suffered his possession to continue.

LE BLANC J. The law gives this defendant a totally different denomination from that of tenant at will.

BAYLEY J. said, that in order to make a descent cast, the party must have a descendible estate. And upon the objection of want of entry to avoid the fine, he cited *Roxe v. Power* (a), and 1 *East*, 575. per Lord *Kenyon*, "Suppose a tenant for years levied a fine, no entry by the landlord would be necessary in order to enable him to maintain ejectment at the end of the term."

Judgment for the Plaintiff. (b)

(a) 2 *N. R.* 1.

(b) *Dampier J.* was absent.

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Wednesday,
Nov. 23d.

The KING against The Inhabitants of MINSTER.

Where the pauper was hired as bailiff to P. who held a farm, under an agreement that he was to have weekly wages, &c. and his master to find him a house, and either to furnish him with two cows, or the pauper was to be at liberty to hire two, and feed them on the farm, and he served three years under the agreement, and lived with his family in his master's house, occupying the kitchen and two rooms, and hired two cows, which fed during the summer in the pastures of his master: held that by the feeding of the cows, which was above the yearly value of 10*l.*, the pauper acquired a settlement.

UPON appeal the Sessions confirmed an order for the removal of *Matthew Fryer*, his wife and children, from the parish of *Bridge* to the parish of *Minster*, in the county of *Kent*, subject to the opinion of this Court upon the following case:

The pauper being settled at *Minster*, and having been married several years, and having had 7 children, a few days before *Michaelmas* 1808 was hired as a bailiff by one *Parker*, who had a farm at *Bishopsbourne*, and resided the greater part of the year about 3 miles distant. The terms of the agreement made between the pauper and his master were as follows: the pauper was to have 10*s.* per week for wages; was to be allowed by his master pork at 5*s.* per score, and grist at 4*s.* per bushel, for the use of his family, these prices being lower than the general prices. His master was to find him a house, and was either to furnish him with two cows, or the pauper was to be at liberty to hire two, and feed them on his master's farm. The pauper went into the service of *Parker* under the said agreement at *Michaelmas* 1808, and continued until *Michaelmas* 1811, and he and his family lived in the house of his master at *Bishopsbourne*, and occupied the kitchen and two rooms up stairs, and his wife took care of the house. The pauper hired two cows, which fed during the summer in the pastures of his master, and in the winter in his master's straw-yard, with straw that was grown upon the master's lands. The Sessions found that the rooms occupied by the pauper and his family, in the house of his

his master, were not of the yearly value of 10*l.*, but that the pasturage and keep of the cows, upon the lands of his master, were above that yearly value.

Bolland in support of the order of Sessions, denied that the pauper rented a tenement within the meaning of 13 & 14 *Car. 2. c. 12.* in *Bishopsbourne*. He admitted that as the case stated that the cows were to be fed, and were fed on the master's farm, there was a profit issuing out of land to constitute a tenement within the distinction taken in *Rex v. Tisbury (a)*. But he argued that here was not "a coming to settle" within the meaning of the 13 & 14 *Car. 2.* The coming to settle thereby meant, was that of a stranger coming to inhabit, not that of a servant, who cannot have a permanent abiding, but may be discharged at any time. Here the agreement that the pauper should have the feeding of two cows, with the other privileges, was in the nature of wages, and not of a renting. And if this should be holden a renting, then all servants in the families of persons of large establishment, to whom apartments of the yearly value of 10*l.* are exclusively appropriated in the houses of their masters, must be considered as renting a tenement and entitled to a settlement. But it does not follow because a person resides in a tenement, that therefore he comes to settle. Here the pauper, as bailiff, was subject to the jurisdiction of the magistrates under the statute of labourers (*b*), and might have been discharged or imprisoned for misconduct, and then the pasturage of his cows would have ceased. A tenure so precarious seems to be widely different from a coming to settle.

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(a) *M. 45 G. 3. 2 Nol. Poor Laws*, 17. 3d edit.

(b) 20 *G. 2. c. 19.*

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tants of
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Berens and *Adolphus* contra, contended that the pauper gained a settlement at *Bishopsbourne*. The admission that the feeding of the two cows was a tenement, is an admission that he gained a settlement, because it admits that he had an interest in land which made him irremovable for forty days, and it is no argument against his acquiring a settlement thereby that he was liable to be turned out of it for misconduct, if in fact he has had an enjoyment of it for 40 days. Therefore in *Rex v. Fillongley* (a), a permission "to enjoy so long as I please, and to be taken again when I please," was holden to confer a settlement. And there is not any analogy between the occupation in this case and the occupation of a servant in a family, because the latter is referable to, and for the better and more convenient performance of his service to the master. Neither need any rent be reserved; none was reserved in the case cited, and it is enough if it be paid by service instead of rent, as in *Rex v. Whirley* (b), by keeping three cattlegates in repair; or, as in *Rex v. Melkridge* (c), by serving as a herd. So here the rent was paid by service, which was the return made for the interest that the pauper took in the land. That that interest is a tenement is clear from the cases of *Rex v. Tolpuddle* (d), *Rex v. Hollington* (e), *Rex v. Stoke-upon-Trent* (f), and *Rex v. Darley Abbey*. (g)

Lord ELLENBOROUGH C. J. Here the pauper had a profit issuing out of land to be taken in loco certo, which has been adjudged by the cases to be a tenement.

(a) 1 T. R. 458.

(b) 1 T. R. 137.

(c) 1 T. R. 398.

(d) 4 T. R. 671.

(e) 3 East, 113.

(f) 10 East, 496.

(g) 14 East, 280.

The

The distinction between the occupation of a servant in the house of his master, and this, has been adverted to by Mr. *Adolphus*, and the argument, as it seems to me, has been properly answered, that the apartments of the servant are only as an appendage of the service, they are allotted to him for the more convenient performance of the service, which is the principal thing. Here it is stated that the pauper hired two cows; and that they were kept on the land of the master during the summer months; and it does not appear that this was connected with the service, or that it was necessary for the convenient performance of it, that he should have the two cows. In this respect, therefore, this case may be distinguished from that of servants having apartments in the houses of their master for the better discharge of their duties to their masters. The case now before the Court falls within those which have been decided, particularly the case mentioned by Mr. *Berens* of *Rex v. Melkridge*, the only difference being, that there he was the servant of many persons, here he is the servant of one only; still the compensation for the tenement in both is the same, namely, the service of the pauper; which the Court held to be equivalent to his paying rent. The other cases of *Rex v. Tolpuddle* and *Rex v. Piddletrenthide* are decisive that this interest was a tenement.

LE BLANC J. If this case depended upon any consideration involving the value of the apartments or lodging which the pauper occupied in the house of the master, I should not think the case of *Rex v. Melkridge* an authority that called upon us to decide in favour of the settlement; but it is stated that the yearly value of

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the pasturage, independently of the house in which the pauper resided, was upwards of 10*l*. That being so, the cases which have been determined have held, that whether the pauper pay in service or in money, it shall be a coming to settle on a tenement. In this case, if the pauper's occupation of the tenement, was necessarily connected with the service of the master, as in the case of occupying apartments in the house of the master, I should have no hesitation in saying that that would not have conferred a settlement, although of a greater yearly value than 10*l*., because the occupation would have been necessary for the performance of the service, for which the master might allot what apartments he pleased. In like manner, if the master had allotted to the pauper so much milk a day, I should have thought the pauper would not have gained a settlement. But in the present case the pauper has a distinct interest in the pasturage of the two cows unconnected with his service to the master's dairy; and this liberty of taking the profits out of land is found to be of a greater value than 10*l*. I do not know therefore how to distinguish this from the cases already decided.

BAYLEY J. Mr. *Adolphus* has pointed out a clear and particular distinction enabling us to decide this case. Here something is given to the servant unconnected with the service. It is the same thing as if the servant had stipulated that as he had a family, he must have certain land for his own occupation, and that the master should allow him to become a distinct occupier of land to the value of 10*l*. a year. If that had been so, there are not wanting cases to shew that it is not necessary that a rent should be paid in money, or indeed that

that there should be any rent at all, in order to constitute him the occupier of a tenement, but a service is quite sufficient. The case of the herdsman (*a*) is full to that point. If that be so, what is the present case but that of a servant who stipulates for a profit out of land of more than the yearly value of 10*l.*, for which he is to pay in service.

Orders quashed. (*b*)

(*a*) *Rex v. Melkridge.*

(*b*) *Dampier J.* was absent.

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BROWN and Others *against* MESSITER.

Thursday,
Nov. 24th.

ACTION against the acceptor of a bill of exchange for 19*5*l.** After the bill was due, and before the commencement of the action, the plaintiff's attorney wrote to the defendant to request payment, and received an answer from the defendant desiring to have a copy of the bill, which he sent, and afterwards made personal application to the defendant for payment, when the defendant requested to see the original, which was shewn him, and he admitted the acceptance and promised to pay it. Afterwards, on the 29th of *July* last, the bill was stolen from the pocket of the attorney, and notwithstanding he had by public advertisements offered a reward for it, he could gain no tidings of it. Under these circumstances *Phelps* on a former day obtained a rule nisi to refer it to the master to see what was due for principal and interest upon the said bill; and now upon the production of a copy of the bill verified by the affidavit of the plaintiff's attorney, and no cause being shewn, the rule was made absolute. (*a*)

The Court referred it to the Master to see what was due for principal and interest upon a bill of exchange, upon the production of a copy of the bill verified by affidavit of the plaintiff's attorney, the original having been stolen out of his pocket, and no tidings of it gained.

(*a*) The rule was obtained and made absolute before one Judge.

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Thursday,
Nov. 24th.

ROYLANCE *against* HEWLING.

A plaintiff who has lain in prison more than 12 months under an execution for the costs of a nonsuit, not amounting to 20*l.*, is entitled to be discharged under 48 G. 3. c. 123.

CASELEE moved to discharge the plaintiff out of custody under 48 Geo. 3. c. 123., he having been in execution more than a twelvemonth for the costs of this action, in which he was nonsuited, and the costs of which amounted to 18*l.* The statute enacts, "that all persons in execution upon any judgment obtained in any court, &c. for any debt, or damages, not exceeding 20*l.* exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of 12 successive calendar months next before the time of their application to be discharged, may, upon application for that purpose, in term time, made to some one of his majesty's superior courts of record at *Westminster*, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution by the rule or order of such court." And he submitted, that although the words "for any debt or damages not exceeding 20*l.* exclusive of the costs" might not in terms include a judgment for costs only, or might even appear to exclude it, yet this being a remedial statute ought to receive a liberal construction.

BAYLEY J. (the only Judge in court) at first doubted whether the act extended to plaintiffs as well as to defendants, and he postponed the case until the court was full, and after he had mentioned it to the bench, Lord *Ellenborough* C. J. said, that the costs became a debt by the judgment, and therefore the plaintiff ought to be discharged. (a)

(a) *Dempier J.* was absent.

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*BASS against CLIVE.**Friday,
Nov. 25th.*

TADDY moved that the plaintiff might give security for costs, upon an affidavit that he had become bankrupt, and that the suit was carried on for the benefit of the estate; but the affidavit did not state that any application had been made to the plaintiff for security. And by reason of that omission he admitted that he could not pray to stay the proceedings, but contended that he was entitled to the rule as above.

The Court will not grant a rule that the plaintiff may give security for costs, unless application has been made to him to give security.

But Lord ELLENBOROUGH C. J. said, that it was an universal rule that the authority of the court was not to be interposed, without ascertaining whether the party will refuse to give security.

Per Curiam (a),

Rule refused.

*(a) Dampier J. was absent.**CHADWICK against BATTYE.**Saturday,
Nov. 26th.*

A RULE nisi was obtained on a former day that the sum of 25*l.* paid into the hands of the sheriff in lieu of bail, and by him brought into court, should be paid over to the defendant, or his attorney, the defendant having put in bail, and having since rendered himself in discharge of them.

A defendant who has put in bail, and rendered in their discharge, is entitled to have the money deposited in the hands of the sheriff, in lieu of bail, repaid to him, under stat. 43 G. 3. c. 46. s. 2.

Espinasse, who now shewed cause, contended that this motion was not warranted by stat. 43 G. 3. c. 46. s. 2., which only allowed the defendant to move the

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Court to have the money deposited repaid to him, in case he shall duly put in *and perfect bail*. But a surrender in discharge of his bail is neither a putting in and perfecting bail, nor is it equivalent to it, for the security of the bail may be better than that of the defendant.

Heath, in support of the rule, cited *Harford v. Harris*. (a)

LORD ELLENBOROUGH C. J. The defendant has gone one step farther than if he had put in and perfected bail; for he has rendered in discharge of his bail. To refuse this motion would be converting that which was intended in ease of the party, into an instrument of vexation.

Per Curiam (b),

Rule absolute.

(a) 4 Taunt. 669.

(b) Dampier J. was absent.

Monday,
Nov. 28th.

VIVEASH and Another *against* BECKER.

DIVETT *against* Same.

A resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempted from arrest upon mesne process.

THIS case was argued on a former day, upon a rule nisi for delivering up the bail-bond to be cancelled, by *Richardson* and *Gifford* against the rule, and *Scarlett* and *Campbell* in support of it. The question made was, whether the Defendant, who had been arrested for a debt of 548*l.* at the suit of the plaintiffs, and compelled to give this bond, was entitled, as consul to the Duke of *Sleswick Holstein Oldenburg*, to privilege from arrest. On the one side it was contended, upon the authority

of *Wicquefort* (a), which it was said is not contradicted by *Vattel*, that consuls are liable to the justice of the place where they reside, as well in civil as criminal matters. On the other side, the authority of *Wicquefort* was said not to be supported by the only two instances which he quotes of the *Dutch* and *Venetian* consuls, whose arrest appears to have been made the subject of complaint and remonstrance by their respective courts, as being a violence done to the law of nations (b). And *Wicquefort*, in another place (c), discoursing of commissioners, who he says are sometimes public ministers, adds, "C'est ce que se doit aussi entendre des consuls." And the authority of *Wicquefort* may be opposed by that of *Vattel*, who lays it down (d), "that a consul is entitled to the protection of the law of nations;" and again, "that his functions require that he should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned," &c. A variety of other extracts from the same authors, and several cases were also referred to on each side in the course of the argument, but as the whole is so fully noticed and commented on in the judgment of the Court, it is conceived that this short outline of the argument will be sufficient. The Court took time to consider.

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Lord ELLENBOROUGH C. J. on this day gave judgment nearly as follows:

This was a rule to shew cause why the bail-bond should not be delivered up to be cancelled, and in the mean time proceedings staid. This application to the

(a) *Book 1. c. 5.*(b) *Ibid.*(c) *Ibid.*(d) *Book 2. c. 2. s. 34.*

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Court was founded on the circumstance of the defendant being consul to the Duke of *Sleswick Holstein Oldenburg*. He grounds his application upon an affidavit in which he states his appointment as consul. He states that on the 20th of *January* last the Duke of *Oldenburg* appointed him his consul by an instrument under the seal of the duchy in this form: "His Serene Highness the Duke of *Sleswick Holstein Oldenburg*, reigning Prince of *Lubec*, &c. having judged proper for the benefit and interest of his subjects to establish a consul and agent for the commercial relations in *England*, and considering the good testimonies which have been rendered to him of Mr. *Charles Christian Becker*, merchant, resident in *London*, has named him the said *C. C. Becker* as such, and confided to him the said office until revocation, on condition that the said consul shall observe the instructions that shall be given him by the government of *Oldenburg*, requesting each and every one, according to his rank, title, and dignity, to recognize the said *C. C. Becker* as consul and agent for the commercial relations of his Serene Highness the Duke of *Oldenburg*, &c. and to grant him the free exercise of his functions, and to let him enjoy the liberties, immunities and prerogatives attached to such a charge." On this instrument one thing is to be observed, that it is not addressed to the sovereign of the state in which he is to exercise his functions, but only to the public at large; it is a kind of sciant omnes, requesting of every one that he may be recognized as consul and agent for commercial relations, and allowed the free exercise of his functions. What those functions are, is in some degree made to appear by what follows. For the affidavit goes on to state, "that he requested the Prince Regent to grant his permission and approbation for him to take upon himself
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the said office, and that the Prince Regent was pleased to approve him, signifying such approbation in an instrument, addressed to all his majesty's subjects, and reciting the appointment by the Duke of *Oldenburg* of *C. C. Becker* to be his consul in *England* to assist his subjects and people in their commerce and traffic there;" and it concludes, " We having, thereupon, approved of the said *C. C. Becker*, as consul aforesaid, our will and pleasure is, and we do hereby require you to receive, countenance, and, as there may be occasion, favourably to assist him the said *C. C. Becker* in the exercise of his place, giving and allowing unto him all privileges, immunities, and advantages thereunto belonging." This leaves him to the immunities which belong to him as consul, for so the words " thereunto belonging" must be understood. Now what are the functions which he is to exercise? That appears from the instructions which accompany the appointment, and which are stated, 1st, " that he shall endeavour to be useful in all possible ways to the subjects of the Duke of *Oldenburg*, &c. particularly to seafaring men, and to render them the necessary succours; particularly (now it specifies) if in time of war any ships with *Oldenburg* passports should be brought up as prize in any of the ports of *England*, and should there be detained under any pretext whatsoever, or if the individual subjects of his Serene Highness, who may be on board either in the quality of sailors, or in any other quality whatsoever, should be detained as prisoners of war, the consul shall be bound to render them all the necessary succours, and immediately to make the necessary intercessions or reclamations at the proper tribunals to procure them their liberty. Secondly, he is charged with the same duties in all the other ports of *England* so long

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as no consul is established there;" it contemplates, therefore, the possibility of there being a consul in every port. "Thirdly, he is authorized to appoint vice-consuls in all the other ports of *England*." And this very much relieves the case from the difficulty which was suggested upon the argument; because it appears he might appoint a vice-consul, perhaps even in the port of *London*. And if that be so, there cannot be any great mischief likely to ensue from his personal restraint; for though he himself may be prevented from exercising his functions, yet if he may delegate those functions, they will continue to be exercised in the same manner as if he was at full liberty. His functions then are purely of a commercial nature, and such as properly belong to a consul, those of advice and intercession; and there is no one function of state purpose to be performed by him as representing the sovereign of his state. This is the instrument from which his functions are to be collected (a). He is invested with them eo nomine as consul, which makes a distinction between the present and the case before Lord *Talbot* (b); for there he was named only "agent of commerce," which left a difficulty, and made part of the labour of the argument in that case, to ascertain what his functions were; he was not named consul. But it must be recollected that Lord *Talbot* said, although he was called only an agent of commerce, he did not think that the name altered the case, and that at most he was only a consul. Such are the words of Lord *Talbot*. Now here

(a) The instructions contained two other articles, 4thly, "Charging the *Oldenburg* captains to present themselves before the consul who is to sign their papers, &c. 5th, Every subject of his Serene Highness who presents himself before the consul, and demands a passport, shall have a right to receive it immediately," &c.

(b) *Barbui's case*, *Cas. temp. Talbot*, 281. cited 3 *Burr.* 1481.

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he is expressly designated, by name, consul, and nothing more. The affidavit proceeds to state "that the Prince Regent's approbation of his appointment to be consul was notified in the *London Gazette* on the 12th of *March* 1814." This carries the case no farther: the instrument which he brings over notifies to every class of persons by the sciant omnes, that he is to have the character of consul, and the same is notified in the *Gazette*. The affidavit then goes on, "that he has ever since exercised the office, that his appointment and powers are still in force, and that the Duke of *Oldenburg* has during the time had no other minister or diplomatic agent in this country, and that he has during the time acted as a diplomatic agent, and as consul for the duke." It would have been as well if he had stated in what particular function as a diplomatic agent distinct from his function as consul, he ever acted for the duke. The affidavit does indeed go on to state, "that during the time he has by the authority and as representative of the duke, applied for and obtained a large supply of arms and ammunition from the *British* government for the duke, and that he has been and is in the habit of receiving instructions from the duke to attend to matters totally distinct from commerce for the duke with the *British* government." But if he was in the habit of receiving instructions for such purposes as these, it would have been material to have shewn that he communicated such instructions; but he has not so done, neither does he affect to allege that the government of this country has received him in the character of a person entrusted to make and making such communications. He says, "he has applied for and obtained from the government

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ment a large supply of arms and ammunition;" be it so; but we cannot but remember, if we carry our recollection back a little, that at the time to which the affidavit relates, it did not require the intervention of a public functionary to make application for and obtain a large supply of arms and ammunition from this country; I allude to the supply of arms which was afforded by this country for the liberation of *Holland*. This supply was probably granted upon the application of this person, in the same manner as I dare say it was upon the application of others who had no public functions, for the liberation of *Europe* from the thralldom under which it lay. In answer to this two affidavits have been filed, the first of which states that the Defendant resides in *London*, and for several years past, and before his appointment of consul carried on and still carries on the business of a merchant in *London*, and in 1811 became bankrupt, and that the defendant owes debts to the amount of 120,000*l.*; that search has been made at the sheriff's office, and that his name is not entered in the lists there as a privileged person; that a consul is not considered as privileged from arrest, and that the sheriff has been in the habit of arresting consuls without any resistance being made. There is another affidavit also stating that application has been made at the secretary of state's office, in order to discover if the defendant's name was registered there as a public minister; and that the deponent was informed that a consul was not considered in that department as a public minister. Thus the question is reduced to this, whether this defendant is entitled to the privilege of immunity from arrest, as belonging to him in his mere character of consul. Every person

who is conversant with the history of this country is not ignorant of the occasion which led to the passing of the statute 7 Ann. c. 12. (a) An ambassador of the Czar *Peter* had been arrested, and had put in bail; and this matter was taken up with considerable inflammation and anger by several of the *European* courts, and particularly by that potentate. In order to soothe the feelings of these powers the act of parliament was passed, in which it was thought fit to declare the immunities and privileges of ambassadors and public ministers from process; and it was enacted, (s. 4.) "that in case any persons should presume to sue forth or prosecute any such writ, or process, such persons, &c. being thereof convicted should be deemed violators of the laws of nations, and disturbers of the public repose, and should suffer such penalties and corporal punishment, as the Lord Chancellor, Lord Keeper, or the Chief Justice of the Queen's Bench or Common Pleas, or any two of them, should judge fit to be inflicted." Thus was conferred a great and extraordinary power, which I am happy to say in no other instance belongs to those persons; but the act of parliament was passed by way of apology, and in order to conciliate the powers offended. It declares also that "all writs and processes that shall in future be sued forth, whereby the person of any ambassador or other public minister of any foreign prince or state may be arrested or imprisoned, &c., shall be deemed to be utterly null and void." Here then the question is if this defendant be an ambassador or other public minister of a foreign prince or state. He certainly is a person invested with some authority

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(a) See 1 Black. Com. 255.

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by a foreign prince; but is he a public minister? There is, I believe, not a single writer on the law of nations, nor even of those who have written looser tracts on the same subject, who has pronounced that a consul is eo nomine a public minister; and unless he be such he is not within the comprehension of the act of parliament. It has been very truly said that the act is declaratory of the common law, and of the law of nations; and hence it has been argued that he may be entitled to this privilege by the law of nations, though he be not expressly designated in the act. That may be so; although it is not very probable that when the act of parliament was passed for the purpose of laboriously and comprehensively exempting, as far as possible, all persons who stood in any relation to foreign states which would entitle them by the law of nations to be exempted, it should have omitted to designate any description of persons whom it meant to include. Therefore, upon the fair understanding of the statute, the question is, whether he be a public minister. If he be, he is protected by the act, his arrest being in prejudice of the rights and privileges of public ministers. But supposing the defendant to be one of those public functionaries who may be entitled to the privileges of the law of nations; how does the case stand upon the usage as it exists under that law? In several books referred to in the course of the argument, and principally in *Vattel*, b. 2. c. 2. s. 34. "Of consuls," I find it laid down thus: "Among the modern institutions;" (and therefore this institution of consul is not like that of the legatus of old, of whom and of whose rights the *Roman* history is full, but according to *Vattel* it is of modern date, and even in more modern times, in *Grotius*, who

is very learned and laborious in his chapter on the subject of legati; the name of consul never occurs; and in *Molloy* there is not a word about consul; but to proceed with *Vattel*) "Among the modern institutions for the utility of commerce one of the most useful is that of consuls, or persons residing in the large trading cities, and especially in foreign sea-ports, with a commission empowering them to attend to the rights and privileges of their nation, and to terminate misunderstandings and contests among its merchants. When a nation trades largely with a country, it is requisite to have there a person charged with such a commission, and as the state which allows of this commerce must naturally favour it, so for the same reason it is likewise to admit a consul. But there being no absolute and perfect obligation to this, the nation disposed to have a consul, must procure itself this right by the very treaty of commerce." He goes on, "The consul is no public minister, and cannot pretend to the privileges appertaining to such character. Yet bearing his sovereign's commission, and being in this quality received by the prince in whose dominions he resides, he is in a certain degree entitled to the protection of the law of nations." No doubt he is entitled to the protection of the law of nations, and so is every man who comes into this country from a foreign state under a safe conduct. *Vattel* proceeds: "The sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of the consul would be insignificant and deceptive. His functions first require that he be not a subject of the state where he resides; as then he would be obliged in all

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things to conform to its orders, and thus not be at liberty to acquit himself of the duties of his post." What is the case of this defendant? He is not indeed stated to be a natural born subject of this country, but he is shewn to be a person owing a temporary allegiance, and it is not negatived that he is a subject born. At any rate it appears that he is a merchant domiciled, and subject to the bankrupt laws. If he has incurred penalties under those laws, shall he be exempted from their operation by being appointed a consul of a foreign prince? *Vattel* says, "his functions seem to require (and this is merely argument and it is put as doubtful) that the consul should be independent of the ordinary criminal justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violate the laws of nations by some enormous misdemeanour." This certainly may at first seem to import that *Vattel* considered a consul to be entitled to all the privileges of an ambassador. But let us advert to the fourth book of the same author, *ch. 6. s. 75*. In the sections immediately preceding that section, he has been discussing the different functions of ambassadors, envoys, residents, and the last description is that of ministers. He then says in *s. 75*. "We have spoken of consuls in the article of commerce. (*B. 2. c. 2. s. 34*.) Formerly agents were a kind of public ministers; but in the present increase and profusion of titles this is given to mere commissioners appointed by princes for their private affairs, and who not unfrequently are subjects of the country where they reside. They are not public ministers, and consequently not under the protection of the law of nations. But a more particular protection is due to them than to other foreigners or citizens, and

some regard in consideration of the prince whom they serve." Then he says, "If the prince sends an agent with credentials and for public affairs, the agent from that time becomes a public minister." Then he goes to another subject and discourses of credentials, by which the character of the minister is made known to the sovereign to whom he is sent. It was so positively averred in argument that *Vattel* was an authority to shew that consuls were under the protection of the law of nations, that I was desirous of consulting him; and the passage to which I have referred shews that it is otherwise. So in another place, *B. 4. c. 8. s. 112.* he says, "A subject of the state may even in accepting the commission of a foreign prince remain a subject." And he adds that the States General of the United Provinces in 1681 declared, "that no subject of the state should be received as ambassador, or minister of another power, but on condition that he should not divest himself of his quality of subject, even with regard to the jurisdiction both in civil and criminal affairs; and that whoever, in making himself known as ambassador, or minister, had not mentioned his quality of subject to the state, should not enjoy those rights or privileges, which are peculiar to the ministers of foreign powers." I confess I should be afraid to say that an ambassador announced under that name would not be entitled to the privileges belonging to the ministers of foreign powers, except upon the condition in the above declaration. But *Vattel* proceeds, "Such a minister may likewise retain his former subjection tacitly, and then by a natural consequence drawn from his actions, state, and whole behaviour, it is known that he continues a subject. Thus notwithstanding the declaration above mentioned,

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those *Dutch* merchants who procure to themselves the title of residents of some foreign prince, yet continue in trade, thereby sufficiently denote that they remain subjects." Again I should be afraid of adopting a rule that would leave it to the party himself, whether or not he would deprive his sovereign of the benefit resulting from the privileges belonging to his character of minister. However *Vattel* says, "Whatever inconveniences there may be in the subjection of a minister to the sovereign with whom he resides, if the foreign prince will put up with such inconveniences, and is contented with a minister on that footing, it is his own doing, and should his minister on any ignominious occasion be treated as a subject, he has no cause of complaint." This is peculiarly the case with respect to consuls; for in fact they generally are the subjects of the state to which they are appointed, and in which they reside. A knowledge of the language of the country, and of the forms which exist there, such as will be best found in a subject of the country, is absolutely necessary for the discharge of their function; and if the sovereign of a foreign state is contented to appoint a subject, he must put up with all the consequences which may attend his being a subject. This is according to what is laid down in *Vattel*, and therefore it has not been correctly asserted that he is at variance with the other authorities upon the nature of a consul's character. *Wicquefort* and *Barbeyrac* are decidedly of the same opinion that a consul is not entitled to the *jus gentium* belonging to ambassadors. And in *Barbui's* case Lord *Talbot* said, that as there was no authority for considering the defendant in any other view than as a consul, unless he could be satisfied that

that those acting in that capacity were entitled to the *jus gentium* he could not discharge him. It appears from a note to that case that the government afterwards settled the matter; and very likely, it was thought convenient to our relations at that time, considering our connection with the sovereign who had appointed the consul, to soothe him by payment of the money. That is the farthest extent to which the argument arising from what was done in that case can be carried; for Lord *Talbot* seems to have been of opinion that as consul he was not entitled. The case in *Burrow* (a) turned merely on the construction of the clause in the act of parliament respecting the servants of ambassadors, and did not involve this question. The case before Lord *Talbot* is the only one upon the subject. *Clarke v. Cretico* (b) was decided upon the ground of the party being divested of the character of consul at the time of the arrest, but the Chief Justice seems to have inclined to the opinion that a consul was not privileged. In the absence then of all authority, either of custom or the law of nations, how can we say that a consul is entitled to this privilege? The instances cited from *Wicquefort* prove the contrary. The dispute between the pope and the republic of *Venice* is detailed at length in (c) *Beawes*, from which it appears that the violence offered to the consul of that republic by the governor of *Ancona*, was of such a sort, and done in such a manner as would have entitled any sovereign state under the like circumstances to have made reclamation; their consul was grossly insulted. Nobody is disposed to deny that a consul is entitled to privileges to a certain extent; such

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(a) *Triquet v. Bath*, 3 Burr. 1478.

(b) 1 Term. 106.

(c) P. 299. 5th edit.

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as for safe conduct, and if that be violated the sovereign has a right to complain of such violation. This consideration disposes of the authority which was endeavoured to be derived from that case. Then it is expressly laid down that he is not a public minister, and more than that, that he is not entitled to the *jus gentium*. And I cannot help thinking that the act of parliament which mentions only "embassadors and public ministers" and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory not only of what the law of nations is, but of the extent to which that law is to be carried. It appears to me that a different construction would lead to enormous inconveniences, for there is a power of creating vice-consuls; and they too must have similar privileges. Thus a consul might appoint a vice-consul in every port to be armed with the same immunities, and be the means of creating an exemption from arrest indirectly which the crown could not grant directly. The mischief of this would be enormous. In this case it does not appear that the debt was not contracted before the time of the defendant's having the character of consul. If we saw clearly that the law of nations was in favour of the privilege, it would be afforded to the defendant; and it would be our duty rather to extend than to narrow it. But we are of opinion that no such privilege exists, but that this defendant is like every other merchant liable to arrest.

Rule discharged.

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The KING *against* The Sheriff of MIDDLESEX,
in a Cause of GEE *v.* WHITE.

Monday,
Nov. 28th.

HOLT on a former day obtained a rule nisi for setting aside, upon payment of costs, an attachment against the sheriff for not bringing in the body, which had regularly issued, bail having been put in, and justified.

The Court, upon application to set aside a regular attachment against the sheriff for not bringing in the body, will require either an affidavit of merits, or that the application is made on behalf of the sheriff, or the bail, without collusion with or indemnity from the defendant.

The rule was opposed by the Attorney-General on the ground that the Court would not grant this indulgence without an affidavit of merits, or that the application was made entirely in ease of the sheriff.

The Court desired the case to stand over for the better ascertaining and settling the practice.

And now Lord ELLENBOROUGH C. J. said that the question was whether the Court upon this application would require either an affidavit of merits, or an affidavit that the application is made on behalf of the sheriff, or the bail, without collusion with or indemnity from the defendant in the cause. And the Court were of opinion that they ought to require such an affidavit. And he referred to *Rex v. Sheriff of Surrey* (a), and *Hardisty v. Storer* (b). But as a different practice had of late often prevailed, the Court gave leave to the sheriff, upon producing an affidavit as above within two days, to make the rule absolute; otherwise the rule to be discharged with costs,

N. B. We were informed that an affidavit was afterwards made by the bail, and the rule made absolute.

(a) 7 T. R. 239.

(b) 1 N. R. 123.

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Monday,
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DOE, on the Demise of WELLS and Others,
against SCOTT and Another.

Devise of all my lands at *H.* to *J. M.*, my cousin and heir at law, his heirs and assigns for ever, provided that he or his heirs do, within six months after my decease, assure to *R. M.* and to his children the copyhold premises at *R.*, and in default thereof to *R. M.* for life, and from and after his decease to his children living at the time of his decease, their heirs and assigns for ever, as tenants in common; *J. M.* and *R. M.* died unmarried before the deviser: Held that this was not a lapsed devise of the whole interest, so as to belong to the heir at law of the deviser, but by reason of the contingent interest which remained undisposed of, if *J. M.* should not assure, and *R. M.* should die without children, the residuary devisees, to whom was devised all the rest of the deviser's lands, &c. wheresoever situate, &c. were entitled.

EJECTMENT for lands in the parish of *Harborne*, in the county of *Stafford*. At the trial before *Graham B.* at the last *Lent* assizes a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Ann Scott, being seised in fee of the premises in question, by her will dated the 9th of *August* 1796, devised "All my messuages, farms, lands, and hereditaments, freehold and copyhold, with their appurtenances, situate in *Harborne* and *Smethwick*, in the parish of *Harborne*, unto *John Milward*, my cousin and heir at law, on the part of my father, to hold to the said *J. Milward*, his heirs and assigns for ever, provided that the said *J. Milward*, or his heirs, do within six months after my decease, in due course of law assure and confirm unto his brother *Richard Milward*, and to his children lawfully begotten, or to be begotten, the copyhold premises situate in *Rowley Regis*, &c. and hereinafter devised by me to the said *R. Milward* and his children, and in default of such assurance and confirmation as aforesaid, I hereby give and devise all my said messuages, farms, lands, and hereditaments, freehold and copyhold, with their appurtenances, situate in *Harborne* or *Smethwick* aforesaid, unto my said cousin *R. Milward* for the term of his natural life, and from and after his decease I give and devise the same unto his children living at the time

of

of his decease, and to their heirs and assigns for ever, to take, if more than one, share and share alike, as tenants in common." The testatrix also devised the copyhold premises, mentioned in the proviso, to *R. Milward* for his life, with divers remainders over, the first being in favour of his children who should be living at the time of his decease; and she also devised other lands, some of which were stated to have been the estate of her late cousin *M. Addyes*, and then followed this residuary clause: "All the rest and residue of my messuages, farms, lands and tenements, late the estate and inheritance of my said late cousin *M. Addyes*, or otherwise, wheresoever situate, lying and being, I give and devise unto *John Scott* and *James Scott*, the two nephews of my said late husband, to hold to them, their heirs and assigns for ever, to take share and share alike as tenants in common;" with limitations in case of the death of either of them in the life of the testatrix. The testatrix died, having outlived both *J. and R. Milward*, who died bachelors. The premises in question were never the estate of *M. Addyes*. The lessors of the plaintiff are the co-heiresses at law of *J. and R. Milward* and of the testatrix. The defendants *John and James Scott* are the residuary devisees named in the will, and as such entered into possession of the premises immediately after the death of the testatrix, and are now in possession. The question for the opinion of the Court is, whether the plaintiff is entitled to recover; if the Court shall be of opinion that he is, the verdict to stand; if not, a nonsuit to be entered.

Abbott on a former day contended, that the lessors of the plaintiff, the heirs at law, were entitled, the devise
to

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to *J. and R. Milward*, having, by reason of the deaths of *J. and R. M.* without children in the lifetime of the testatrix, become a lapsed devise, and that the defendants, the residuary devisees, were not entitled. And he said that a residuary devisee stands upon a very different footing from a residuary legatee, for a residuary bequest of personal estate carries, not only every thing not disposed of, but every thing that in the event turns out not to be disposed of; but it is otherwise as to the real (*a*) estate, for a residuary devisee does not take a lapsed (*b*) devise. It is true, that if there be a partial limitation with a devise over, and the partial devisee be removed in the testator's lifetime, the next in remainder shall take; and the residuary devisee shall also take all such interest in the real estate as is undisposed of, i. e. if any thing short of the fee be disposed of; and so also a remote reversion will pass under a residuary clause (*c*), though that will always depend upon the intention of the testator (*d*). But where the testator makes a disposition of the whole fee, so that the whole would pass if he were to die immediately, there if the devisee die before the testator, so that the devise becomes lapsed, the heir at law, and not the residuary devisee, shall take: and the reason is, that as no part of the testator's interest remains undisposed of, the testator cannot intend to give any interest to the residuary devisee. Such was the principle which governed the decision in *Doe v. Underdown* (*e*). And in *Doe v. Sheffield* (*f*), where it was considered that the residue would not have gone to the heir at law, but

(a) 8 Ves. 25.

(b) 15 Ves. 415.

(c) *Chester v. Chester*, 3 P. W. 55. *Doe v. Weatherby*, 11 East, 324.(d) *Goodtitle v. Miles*, 6 East, 494.(e) *Wilkes*, 296.

(f) 13 East, 526.

to the residuary devisee, that was upon the supposition that if the testator had died immediately, the whole would not have passed, and therefore it did not fall within the above principle. The rules laid down by *Willes C. J.* in *Doe v. Underdown* will serve for the determination of this case.

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Holroyd contra did not controvert these principles, but rested the claim of the defendants, the residuary devisees, mainly upon this distinction, that here was an interest remaining undisposed of, there being no devise of the fee absolutely. The devise is to *J. M.* in fee upon a condition, (who as heir would have taken by descent in fee absolute,) and in the event of the condition not being performed, to *R. M.* for life, with a contingent remainder in fee to his children living at his death; and there is no devise over; consequently there is a residue still undisposed of. And therefore the conclusion which was well drawn from the premises in *Doe v. Underdown*, namely, "that when a testator has given away all his estate in lands, so that if he were to die immediately nothing remains undisposed of, he cannot intend to give any thing in these lands to his residuary devisee," cannot be drawn here from premises which are different, for here the testatrix has not given away all her estate in these lands. Here if *J. M.* had died before, and *R. M.* had survived the testatrix, doubtless *R. M.* would have taken, the first estate to *J. M.* being only a preceding limitation, and not a preceding condition to give effect to the subsequent limitation; for though it was held otherwise in *Roe v. Fludd* (a), the authority of that case has been

(a) *Fortesc.* 184.

repeatedly

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repeatedly overruled (a). The death of *J. M.* then before the testatrix, if *R. M.* had survived her, would have been the same thing as if there had been no devise to *J. M.*, or as if he had survived and failed to perform the condition, in which case the limitation to *R. M.* would have taken effect as a limitation to him for life with a contingent remainder to his children. But what is that but a devise of a particular estate only, leaving a reversion which will pass under the residuary clause? For a contingent remainder is not like an absolute devise in fee; it does not shew that the testator cannot intend, if the contingency does not happen, to give an interest to the residuary devisee; and it appears from a variety of cases which are all collected by Mr. *Cruise* (b), that wherever there is a reversion left, it will pass under the residuary devise, if there be words sufficient to dispose of all the testator's property, unless the testator shews an intention to the contrary. Is there any thing here to shew that the testatrix intended that the reversion should not pass to the residuary devisees? It might be sufficient to answer upon the authority of *Goodright v. Marquis of Downshire* (c), and *Doe v. Weatherby* (d), that there is nothing manifestly to exclude it; but *Doe v. Sheffield* (e) is a strong authority in favour of the residuary devisee, for if he would have been entitled in that case, and not the heir at law, if the surviving sister had not taken the whole, by reason that the devise to the other sisters, who were dead at the time, was not a lapsed

(a) *Avelyn v. Ward*, 1 Ves. 420. *Andrews v. Fulham*, cited *ib.* 421. *Roe v. Wicket*, cited *ib.* S.C. *Willes' R.* 303. *Gulliver v. Wicket*, 1 Will. 105. See 2 *Fearn*. 393, 4. 4th edit.

(b) 6 *Cruise on Real Property*, 220 to 226.

(c) 2 *B. & P.* 600.

(d) 11 *East*, 322.

(e) 13 *East*, 526.

devise, a fortiori he shall be entitled here where the devise is to children who were never in esse, or capable of taking. As to *Doe v. Underdown* the clear distinction is, that there no reversion was left, but the whole was given to the devisee, who, if the testator had died immediately, would have taken a fee absolutely.

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Abbott in reply urged that this was a case which must be governed by the intention of the testatrix, and that her intention seemed to be to dispose of all her interest, for her first devise is of the fee, subject only to a condition, upon the performance of which it was to become absolute, and the presumption is that a devisee will rather perform the condition than by not performing it forfeit the estate; or it might have become absolute by the death of *R. M.* to whom the condition was to be performed. It is probable therefore that the testatrix contemplated the passing her whole interest.

Lord ELLENBOROUGH C. J. said that if the testatrix understood what she intended, she must have contemplated a possible contingency still remaining. That this was certainly a case of some novelty and difficulty, which he had not anticipated at the outset of the argument; the case had been extremely well argued.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. The only question in this case is whether the devise to *Richard Millward* for life, and after his decease to his children, (which devise was limited to take effect upon the default of *John Millward* the devisee in fee, in not assuring and confirming certain

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tain copyhold premises mentioned and described in the will to his brother *Richard* and his children,) having become a lapsed devise by the deaths of *John* and of *Richard* (without children) in the lifetime of the devisor, the estate meant to be devised by the will, does under the authority of *Doe v. Underdown, Willes, 293.*, and other cases, belong to the heirs at law of the devisor, the lessors of the plaintiff, or whether it passed under the will to the defendants as residuary devisees. The rule of law as laid down by Lord King in *Wright v. Hall*, and recognized and adopted by Lord C. J. *Willes* in *Doe v. Underdown*, is, "that though the will is not complete until the death of the testator so as to vest any thing in the devisee, yet that the intent of the testator is to be taken to be as things stood at the time of making his will; for the testator makes his will as if he were to die that moment, and it cannot be presumed that he intended to devise a contingency, which afterwards happened, and which he could not then foresee:" and afterwards, "the devise must be taken to mean the rest and residue of the lands *unbequeathed* at the time of making the will." The law as laid down in this, and the other cases to the same effect, not being disputed by the counsel on either side, it brings it to this mere question arising on the face of the will, Whether, at the time of the making of the will, and upon the face of the will itself, there was any interest in the lands devised not fully disposed of; for if there was, the consequence is, that the residuary devise must operate upon such interest. And, upon adverting to the terms of the will, it appears to us clearly that there was such interest undisposed of by it. Although the events immediately contemplated and supposed by the testatrix might
 happen,

happen, that *John* and *Richard* should both survive her, and that *John Milward* should within the period prescribed assure and confirm unto his brother *Richard Milward* and his children the copyhold premises, or (if *John* should make default and not so assure and confirm the copyholds) that *Richard* should leave children at his death, in which events the whole would have been disposed of, yet the contrary course of events might take place, *i. e.* that *John* should not assure the copyholds to *Richard*, and that *Richard* should die without children; and for these possible (and since actual) events, upon the happening of which the estate is undisposed of, the will has not specifically provided. There is therefore a residue of the lands unbequeathed at the time of the making of the will, upon which the residuary devise may operate, according to the language and doctrine of Lord C. J. *Willes* in the case above referred to, and which is the admitted law upon the subject. The will being therefore as far as concerns the absolute disposition of this property incomplete and imperfect at the time when it was made, in not disposing of the interest which evidently remained to be disposed of, if *John Milward* should not assure the copyhold estate to *Richard*, and *Richard* should die without children, the necessary consequence is, that the interest depending on those contingencies passes by the general residuary clause, to the defendants as residuary devisees. A non-suit must therefore be entered.

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Where by charter-party between the ship-owner and freighters, the ship-owner covenanted to proceed from *L. to Naples*, and there make a right and true delivery of the outward cargo, and *having so done* receive on board a return cargo, restraint of princes, &c. excepted, and the freighters covenanted in consideration of the premises that at *N.* they would find and provide, as they did warrant and assure to the ship-owner, a full and complete return cargo, &c. and that 1750*l.* should be paid on delivery of the outward cargo, which should be considered as earned for outward

freight: held that in covenant against the freighters for not providing a return cargo at *N.*, they could not plead in excuse of performance that the outward cargo was seized by the government at *N.* and never delivered to them; for the delivery of the outward cargo was not a condition precedent to the providing a return cargo: but the delivery of the outward cargo was a condition precedent to the payment of the 1750*l.*, and therefore a breach assigned for non-payment thereof was under these circumstances not sustainable. A deed *inter partes* cannot operate as a release to strangers: therefore a charter-party between *A.* and *B.*, in consideration of a former charter-party between *A.* and *C.*, which former charter-party, in consideration of the freight *B.* was to pay, was thereby declared null and void, *A.* agreeing to cancel the first in consideration of the second, and *C.* was thereby acquitted of all claims which *A.* might have against him in virtue of the first charter-party, was held not to operate as a release from *A.* to *C.* of the first charter-party.

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Naples, and that at *Naples* they would find and provide, as they did thereby warrant and assure unto the plaintiff, a full and complete return cargo of wine, &c., and that the same should be sent along-side, &c., and that they would pay for freight at the rate of 15*l.* per ton for every ton of 252 gallons of wine, &c. and for any other goods a proportionate freight per ton; and that 175*ol.* part of the said freight, &c. should be paid on the delivery of the ship's outward cargo (which was to be considered as earned and due for outward freight) by a bill of exchange, &c., and the remainder of the freight, &c. in equal moieties by two bills payable within a certain time after the ship should be reported inward at the custom-house in *London*; that it was covenanted that 85 running days should be allowed the freighters for receiving the outward cargo, touching at *Cagliari*, unloading and reloading at *Naples*, and delivering her return cargo at *London*, and 20 days more on their paying demurrage at the rate of 15*l.* per day. The plaintiff then avers, that the ship with her outward cargo proceeded on her voyage and arrived at *Naples*, and that he gave notice of her arrival and readiness to unload, and was at all times ready and willing, as far as in him lay, to make a right and true delivery to the agents of the defendants at *Naples* of the said outward cargo; and that afterwards and during the time that the ship was remaining at *Naples* for the purpose of making such right and true delivery, the ship together with her said cargo was by the order and under the authority of certain persons exercising the powers of government at *Naples*, without any default of the plaintiff, with great force and violence, seized and taken, and her cargo unloaded, landed and delivered out of the said ship by

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and to certain persons to the plaintiff wholly unknown, by the order and under the authority of the persons so exercising the powers of government at *Naples*; and that after the cargo had been so seized, &c. the plaintiff having full possession of the ship for all purposes of loading the same according to the terms of the charter-party, was ready and willing, and then and there duly notified in writing to the agents of the defendants at *Naples*, that he was so ready and willing, either to receive on board such a return cargo as the agents should provide, or to proceed, &c. agreeably to the terms of the charter-party; and that afterwards and during the time that the ship was so lying at *Naples* the 85 running days expired, and the defendants detained the ship on demurrage 20 days. And the plaintiff assigns for breach, 1st, that neither the defendants or their agents did within the 85 running days or 20 days of demurrage provide a full and complete cargo, &c., and send or cause the same to be sent along-side at *Naples*, &c., but wholly made default, and the ship was for want of such cargo compelled to remain at *Naples*, because by the laws and resolutions of the persons then exercising the powers of government there, the ship was not allowed to depart from the port of *Naples*, without a sufficient cargo of such goods as by the charter-party was agreed to be furnished, and which goods by the laws and resolutions above mentioned were permitted to be exported from the said port, &c., whereby the ship was detained at *Naples* over and above the 85 running days, and the 20 days of demurrage, 430 days, during all which time the plaintiff was deprived of the use and advantage of the ship, and incurred divers great charges, &c. 2d breach, That neither the defendants

or their agents have paid the 1750*l.* in part-payment of the freight, &c. by bill or otherwise.

Plea to the first breach (a), That the defendants, from the time of the arrival of the ship at *Naples*, were always ready and willing to receive there from on board the ship the said outward cargo, and upon a right and true delivery thereof to provide a full and complete return cargo, and to send the same along-side at *Naples* within the lay-days or days of demurrage, whereof the plaintiff had notice, and was requested and ordered by the agents of the defendants to unload the ship at *Naples*, but before the outward cargo, or any part, was or could be delivered, and before any default or delay whatever was committed or incurred by the defendants or their agents, in or about the receiving or sending for the same, the ship, with her outward cargo, at *Naples*, was without any default of the defendants or their agents forcibly seized and taken, and the cargo was unloaded and landed by the persons exercising the powers of government there, and was afterwards by those persons kept and converted to their own use, and never delivered or returned to or under the controul of the defendants or the plaintiff, and the plaintiff never did or could make a right or true delivery of the said outward cargo, or any part thereof, to the defendants or their agents, and never was ready or able, after having so done, to receive on board any homeward cargo from the defendants or their agents, by reason of which premises the defendants were prevented and discharged from providing or sending along-side any return cargo, &c.

Demurrer and joinder.

(a) This was the second plea upon the record.

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Pleas to the 2d breach (a); 1st, That the plaintiff did not nor would at any time make any delivery of the outward cargo, or any part thereof, to the defendants or to their agents at *Naples* or elsewhere, nor did the defendants or their agents at any time receive the same or any part thereof, &c. 2dly, That they, the defendants, from the time of the arrival of the ship at *Naples*, were always ready and willing to receive there from on board the ship the outward cargo, whereof the plaintiff had notice, and was requested and ordered by the agents of the defendants to unload the ship at *Naples*; and then pleaded the same facts as in the plea to the first breach.

Replication to the first of these pleas, That the ship proceeded with her outward cargo and arrived at *Naples*, and the plaintiff gave notice of her arrival and readiness to unload, and was at all times ready and willing, as far as in him lay, to make a right and true delivery to the agents of the defendants at *Naples* of the outward cargo, and that afterwards and during the time that the ship was duly remaining at *Naples* for the purpose of making such right and true delivery, the ship, together with her said cargo, was by the order and under the authority of certain persons exercising the powers of government at *Naples*, without any default of the plaintiff, with great force and violence seized and taken, and her cargo unloaded and delivered out of the said ship by and to certain persons to the plaintiff wholly unknown, by the order and under the authority aforesaid, &c.

Demurrer to this replication and joinder.

To the 2d plea demurrer and joinder.

(a) These were the fourth and fifth pleas upon the record.

Pleas to the whole (a); 1st, That after the making of the charter-party in the declaration mentioned, and before the commencement of this suit, to wit, on the 21st of *May* 1813, the plaintiff, by his certain writing of release then and there made, sealed with his seal, and to the Court now here shewn, did release and quit claim to the defendants the said *covenants* of the defendants in the said charter-party contained, and all claims and demands of the plaintiff against the defendants in respect thereof, and in respect of any damages by him sustained by reason of all breaches thereof committed by the defendants, &c. 2dly, That after the breaches of covenant assigned in the declaration, and before the commencement of this suit, the plaintiff, on the 21st of *May* 1813, released to the defendants all *damages* by him sustained by reason of the breaches of covenant in the declaration assigned.

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Replication to the first of these pleas, craves oyer of the said release, which is set forth (b), and thereupon the plaintiff replics that the said release purports to be and is a deed indented, and made, on the day and year therein mentioned, between the plaintiff, by the name and description of *Seth Storer*, sole owner and master of the *Concord*, of the one part, and *Vallin Routh* and Co., by the name and description of *Vallin Routh* and Co., by the order of *W. Eppes Routh* of *London*, (for account of *Schneider* and Co., merchants of *London*, and *Harford* and *Visgers*, merchants of *Bristol*,) of the other part; to which release the defendants (between whom and the plaintiff the charter-party and the covenants in the declaration stated were made and entered into, and

(a) These were the fifteenth and sixteenth pleas.

(b) See the judgment of the Court.

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in respect of which covenants and the breaches thereof by the defendants, the damages in the declaration have accrued to the plaintiff,) are no parties, but are wholly strangers thereto; and the charter-party in the declaration mentioned to have been made between the defendants and the plaintiff, notwithstanding the supposed release in the plea, hath been always, from the time of making the same, and still is in full force and effect between the plaintiff and defendants, not at all impaired nor rendered less available in law by any such supposed release, &c. There was a similar replication to the last plea.

Demurrers to both replications.

Puller, for the plaintiff, at the outset abandoned the claim to payment of the 175*l.* for outward freight, admitting that by the terms of the covenant the delivery of the outward cargo was a condition precedent to the payment of the 175*l.*, so that the breach for non-payment thereof could not be supported. And this disposed of all farther argument upon that breach, and the pleadings in answer to it. Upon the rest he made two questions, 1st, Whether the delivery of the outward cargo at *Naples* was, under the circumstances, a condition precedent to the providing a homeward cargo; 2dly, Whether the subsequent charter-party amounted to a release of the former. 1st, He argued that the delivery of the outward cargo was not a condition precedent to the providing a return cargo, the covenant being absolute to provide a return cargo, "as the defendants did warrant and assure to the plaintiff," and not like the covenant for the payment of the 175*l.* depending "on the delivery of the outward cargo." And this difference in the language of the two covenants shews that the parties did not intend the same thing in both, and that
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when they did intend to make a condition precedent they knew how to express it so as to leave no doubt. The rule laid down in *Ritchie v. Atkinson* (a) and *Atkinson v. Ritchie* (b) is this, that whether a thing be a condition precedent depends on the reason and sense of the thing, as it is to be collected from the whole contract. Now here the plaintiff has covenanted to deliver the outward cargo, with an express exception of the restraint of princes, &c.; but if, as the defendants would have it, he cannot insist upon their covenant to provide a return cargo, by reason that he was prevented by the *Neapolitan* government from delivering the outward cargo, what is that but saying that though he has in express terms excepted a particular event, he shall nevertheless by construction be liable in that event? This exception has always been considered as an exception for the benefit of the ship owner (c), and the general covenant by him to make a true delivery has never been held to bind him to become an insurer for the delivery. If it were to be held that the delivery was a condition precedent, the consequence would be, that if the ship owner were to be prevented from delivering but the smallest particle of the outward cargo, he would lose the whole benefit of his charter-party. Such a construction would be neither according to the sense or reason of the thing, as it is to be collected from the whole contract. 2dly, He contended that the subsequent charter-party did not operate as a release of the former, upon the principle that a deed *inter partes* was confined in its operation to those who were parties to it; for which he cited *Scudamore v. Vandensene* (d), *Bro. Estranger, al-fait*, pl. 21. 4 *Bac. Ab.*

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(a) 10 *East*, 295.(b) *Ibid.*, 530.(c) *Blight v. Page*, 3 *Bos. & Pull.*, 295. n.; *Touteng v. Hubbard*, *ib.* 298, per Lord Alvanley C. J.; *Sjoerds v. Luscombe*, 16 *East*, 201.(d) 4 *Inst.* 673.

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Release, 266. *Gilby v. Copley*(a), *Frontin v. Small* (b), and several other cases, which are collected in a note to *Pigott v. Thompson* (c). It is true that for avoiding circuity of action covenants between the same parties have been construed to operate as a release, but if that were so, where the parties are different, there would be no mutuality.

Richardson contra argued, that the delivery of the outward cargo was a condition precedent to the providing a homeward cargo, chiefly upon this ground, viz. that the plaintiff has covenanted to make a right and true delivery, &c. and that *having so done*, the ship should receive on board the return cargo, &c.; whence he concluded that the plaintiff's receiving on board a return cargo was to depend on his having made a right and true delivery, &c. And if that were so, the providing such return cargo must also depend upon the same condition; otherwise this hardship would follow, that the defendants would be obliged to provide a return cargo, although the plaintiff would not be obliged to receive it. Yet the defendants only covenant in consideration of the premises. The true construction, therefore, of these covenants, taking them together, is, that they are reciprocal, that the one shall deliver the outward cargo, and upon such delivery the other shall provide the homeward cargo; consequently whatever operates in excuse of the delivery of the outward cargo shall equally operate in excuse of the providing a homeward cargo. The non-delivery of the outward cargo goes to the whole consideration, and therefore falls within the rule in *Boone v. Eyre* (d); for the

(a) 3 *Lev.* 138.(b) 2 *Ld. Raym.* 1418.(c) 3 *Bos. & Pull.* 149.(d) 1 *H. Bl.* 273; *note*, and cited in 6 *T.R.* 573.

produce

produce of the outward cargo was to be the fund and means of obtaining the return cargo. And no such difficulty as suggested will occur in case the plaintiff should be prevented from delivering some small portion of the goods; for if he make a substantial delivery it will satisfy the covenant; in the same manner as in *Davidson v. Gwynne* (a) a delivery of the entire quantity was held sufficient to satisfy a covenant to make a right and true delivery of the cargo, so as to entitle the covenantor to freight, though the quality of the cargo was deteriorated by his negligence, that being the subject of a counter remedy. Upon the second point he said, that the rule of law that if a charter-party be expressed to be made between *A.* of the one part, and *B.* of the other, it cannot work a release to *C.*, was of a very technical and refined nature, such as the Court would hardly extend beyond the very letter. *Cooker v. Child* (b) shews how slight a distinction will vary the rule; and none of the cases cited contra are applicable to a release like the present. *Scudamore v. Vandenslene* only decided, that one who was in effect no party to the indenture, though his name was introduced into the covenants, could not release another who was a party to it. In *Gilby v. Copley* there was not any decision, three of the Judges differing in opinion with *Levins J.* who upheld the rule. And the principle is not universally true that one who is no party to a deed cannot be affected by it, if the deed be expressed to be made between parties; for a feoffment made between *A.* and *B.*, with a letter of attorney to *C.*, to make livery, though *C.* be not a party to the deed, is good, and the estate shall pass by

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(a) 12 East, 385.

(b) 2 Lev. 74.

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his livery, *Dicker v. Noland* (a), *Moyle v. Ewer* (b); and if that be so, why may he not be released? Here the charter-party uses apt words of release, for the defendants are "thereby acquitted," &c. *Com. Dig. Release, A. 1.*

Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This was an action of covenant upon a charter-party between the plaintiff, as owner of the ship *Concord*, and the defendants the freighters. By the charter-party the ship was to proceed by *Cagliari* to *Naples*, and there make a delivery of her outward cargo, and having so done, she was to take on board a homeward cargo, and proceed therewith to *London*. There was an eventual stipulation for her going to *Galipoli*, but that became immaterial. The defendants covenanted that they would find and provide, as they did warrant and assure to the plaintiff, a full and complete homeward cargo, and they stipulated to pay freight by the ton, and that 1750*l.*, part thereof, should be paid on the delivery of the outward cargo, which was to be considered as earned and due for outward freight. The declaration assigned several breaches, the first of which was, that the defendants did not find and provide a homeward cargo, and another, that they did not pay the 1750*l.* freight. The other breaches did not come in question. To the first of these breaches the defendants pleaded, that after the ship's arrival the outward cargo was, without any default of the defendants, forcibly seized and landed, and kept by the persons

(a) *Harg. Co. Lit.* 52. b. n. 4. S. C. 2 *Roll. Abr.* 8. pl. 12.

(b) *Cro. Eliz.* 905. *Noy*, 49.

exercising

exercising the powers of government at *Naples*, and never was returned to the plaintiff or defendants, and the plaintiff never did or could make a right or true delivery of any part thereof; and to the plea, stating these facts, viz. the 2d, there is a general demurrer. To the 3d plea there was a demurrer, upon which the plaintiff has had leave to amend. The 4th and 5th pleas, with the pleadings thereon, insist upon the same facts in answer to the 2d breach, and the plaintiff's counsel was satisfied upon the argument, and, we think, rightly, that he could not support that breach. The defendants also pleaded, in their 15th plea, a release of the covenants in the charter-party, and of all claims and demands thereon; and in their 16th plea, a release of all damages sustained by the plaintiff by the breaches of covenant assigned in the declaration. The plaintiff cravedoyer of these deeds of release, and the defendants have set forth, as and for the deed containing this release, a charter-party of the 21st May 1813, indented and made between the plaintiff of the one part, and *Vallin Routh* and Co., for account of Messrs. *Schneider* and Co. of *London*, of the other part, whereby the plaintiff let the ship to go to *Galipoli*, *Malta*, and *London*, and in consideration thereof, and more particularly in consideration of the charter-party mentioned in the declaration, which charter-party, in consideration of the freight and monies *Vallin Routh* and Co. were to pay, was thereby declared to be rendered null and void, the plaintiff agreeing to cancel that first charter-party for and in consideration of the 2d, and the defendants were thereby (said to be) acquitted of all claims which the plaintiff might have against them in virtue of that first charter-party, and the plaintiff pledged himself to deliver the same to *IV. Eppes Routh* within

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a convenient time not exceeding 60 days after the ship's arrival in *England*, and for those considerations *Vallin Routh* and Co. covenanted to give the plaintiff a cargo and pay him certain freight. Upon the setting out of this deed, as and for the release pleaded by the defendants, the plaintiff has replied that the said deed is made between the plaintiff of the one part, and *Vallin Routh* and Co. of the other, to which the defendants are strangers, and that the charter-party mentioned in the declaration is still in force; and thereto the defendants have demurred. There are, therefore, two questions; one, Whether the seizure of the outward cargo by the *Neapolitan* government discharged the defendants from the obligation, which their covenant otherwise would throw upon them, to find and provide a homeward cargo; the other, Whether the charter-party of the 21st of *May* 1813 is by operation of law a release to these defendants. Upon the former of these questions the defendants contend that the right and true delivery of the outward cargo was a condition precedent, and that till the performance thereof by the plaintiff they were under no obligation to provide a homeward cargo, and unless they can establish this position, the question upon the 2d plea must be determined against them. The covenant from them contains no words which import to make the delivery of the outward cargo a condition precedent; they covenant generally, and without qualification, that the outward cargo shall be found and provided, and sent along-side the ship, and received from on board at *Naples* or *Galipoli*, and that at one of those places they would find and provide, as they did thereby warrant and assure to the plaintiff, a full and complete cargo. It is contended, however, that from the wording of the plaintiff's covenant this condition precedent is to be implied. That covenant, as

far as is material to this question, is, that the ship should go to *Naples*, and there make a right and true delivery of her outward cargo, and that having so done she should take and receive a homeward cargo; and the argument is that the words "having so done" would have excused the plaintiff from taking on board a homeward cargo if he had not first delivered his outward cargo; and that whatever would have excused the plaintiff from receiving would also excuse the defendants from loading. It does not appear to us, however, that these words would have been any excuse to the plaintiff; and admitting that they would, it by no means follows that they afford one to the defendants. The words seem rather intended to mark the time when the plaintiff's obligation to receive a homeward cargo should attach, viz. when his ship from being clear of one cargo should be in a condition to receive another, and they are unaccompanied with those express words of condition which would naturally have been used, had there been any intention of giving the plaintiff an option of terminating the contract, and refusing a homeward cargo, if he should have been prevented by any accident from delivering the outward cargo. But admitting that the plaintiff might have been discharged from his obligation to receive, does it follow that if the plaintiff is willing to receive, the defendants are discharged from their obligation to deliver? The plaintiff might wish to reserve an option to himself, and might therefore qualify his covenant; but he might not choose to give any option to the defendants, and might insist from them upon an unconditional and unqualified covenant. The plaintiff has in terms introduced, as an exception into his covenant, the perils of the seas and capture, restraint, or detention, by enemies, princes,

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princes, or rulers, but he has suffered no such exception to be in the covenant of the defendants. He did not therefore mean that whatever would be an excuse to him should also be an excuse to the defendants; and we cannot therefore by implication from the wording of the plaintiff's covenant, introduce an exception into that of the defendants. Nor is there any ground from the nature of the thing to imply such an exception. The outward cargo may be intended as the fund to procure the homeward cargo, but it by no means follows that it must be so, and in very many instances the homeward cargo is procured and in readiness to ship before the outward cargo arrives. We cannot therefore consider the right and true delivery of the outward cargo as a condition precedent; and the demurrer therefore to the second plea must be allowed. As to the release, the objection is this, that where there is such a deed as is technically called a deed *inter partes*, that is, a deed importing to be between the persons who are named in it, as executing the same, and not as some deeds are, general to "all people," the immediate operation of the deed is to be confined to those persons who are parties to it; no stranger to it can take under it except by way of remainder, nor can any stranger sue upon any of the covenants it contains. For this position, 2 *Inst.* 673. and several other authorities to which we have referred were cited, and the same doctrine occurs in *Co. Litt.* 231. *a.* The defendants' counsel did not deny these cases, but he denied their application to a release, and he brought under our notice *Cro. Eliz.* 905. and *Noy*, 49. where in an indenture of feoffment between *A.* of the one part and *B.* of the other, a letter of attorney to a stranger to the indenture

ture to deliver seisin was adjudged good. A letter of attorney however passes no interest, but merely gives an authority, and such authority is essential to effectuate the conveyance from *A.* to *B.* But the release in this case, if it is to operate as a release, takes something out of the plaintiff, viz. his right to sue, and passes to the defendants an indemnity and bar against the plaintiff's claim. This case therefore appears to us within the general rule, and not within the excepted case; and we are therefore of opinion that the demurrer to the replications to these pleas cannot be allowed. The consequence upon the whole record is, that there must be judgment for the plaintiff upon the 2d plea, and upon the replications to the 15th and 16th pleas, and for the defendants on the replication to the 4th and upon the 5th pleas.

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STORER
against
GORDON.

DURHAM *against* the Marquis of HERTFORD.

Mondry.
Nov. 28th.

THE stat. 51 *Geo. 3. c. 30.* (inclosure act) s. 8. enacts, that any person dissatisfied with the determination of the commissioners, may bring an action upon a feigned issue against the person in whose favour such determination shall have been made, and if it shall appear that the party claiming is entitled to any qualified or less interest than was claimed, the jury may

By 51 *G. 3. c. 30.* (inclosure act,) "any person dissatisfied with the determination of the commissioners may bring an action against the person in whose favour such determination shall have been made, and if it shall appear that the party claiming is entitled to a qualified or less interest, the jury may declare the same on their verdict, to be indorsed on the postea, in addition to the verdict given on the issue joined, but the costs of such action shall abide and be determined by the verdict given upon the issue joined:" and action brought against defendant for claiming right of common in respect of 91 acres, and upon the general issue, the declaration consisting only of one count, verdict for plaintiff as to 30 acres, and for defendant for the residue, and indorsement on the postea that jury find the right of common in respect of 60 acres, &c. : held that plaintiff was entitled to general costs.

declare

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against
the Marquis of
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declare the same by their verdict, to be indorsed on the postea, in addition to the verdict given on the issue joined, but nevertheless the costs of such action shall abide and be determined by the verdict given upon the issue joined.

In pursuance of this clause the plaintiff brought an action upon a feigned issue against the defendant, and declared that the marquis and marchioness in right of the marchioness were seized of 91 acres and 13 perches of land, and in respect thereof claimed to be entitled to right of common, &c. The declaration consisted of one count only, and the defendant pleaded the general issue. A verdict was found for the plaintiff as to 30 acres, and for the defendant as to the residue, and the indorsement made on the postea was that the jury find the right of common in respect of 60 acres of land and a messuage.

The master taxed the plaintiff his general costs of the action.

A rule nisi was obtained that the master might review his taxation.

Richardson, who shewed cause, contended that the general rule was that when the plaintiff obtains a verdict, though not for the whole, yet he is entitled to the general costs (a), and that there was nothing in this statute to vary the rule. Here the jury find that the party claiming is entitled to a less interest than was claimed, viz. for 61 instead of 91 acres; consequently the plaintiff obtains a verdict for 30, and the statute directs that the costs shall abide the verdict. And *Braithwaite*

(a) *Astley v. Young*, 2 Barr. 1232; *Bridges v. Raymond*, 2 Bl. R. 300.

v. *Bradford* (a) is distinguishable from this case, because there the plaintiff claimed in respect of several distinct rights, upon distinct issues, and only recovered upon some of them; but here is but one issue joined, which is found for the plaintiff.

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against
the Marquis of
HARTFORD.

Holroyd, contra, submitted that this being a verdict given upon the issue joined, partly for the plaintiff and partly for the defendant, the costs of the action which are directed by the act to abide the verdict given, ought also to be partly for the plaintiff and partly for the defendant. The act has introduced a different rule from the general rule. And the defendant does not appear to be a party entitled to a qualified or less interest than he claimed, for according to the verdict he is entitled to the same interest that he claimed, only it is in respect of a less number of acres; a qualified or less interest implies an abridgment of the right claimed, as if he should claim for all cattle levant and couchant, and should be entitled only to a stint, &c. *Braithwaite v. Bradford* cannot be distinguished; the direction as to costs in that case, "that they should be borne by the plaintiff if the verdict should be in favour of the commissioners' determination, and if against it by the proprietors at large," is in effect the same as here; and whether the verdict be given upon one issue joined, in part for the plaintiff, and in part for the defendant, or whether upon several issues joined, it be given on some issues for the plaintiff, and on others for the defendant, is in reason the same thing; in both it may be said with Lord *Kenny* (b), that "it seems contrary to the

(a) 6 T. R. 599.

(b) T. R. 601.

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against
the Marquis of
WERTFORD.

principles of natural justice that a plaintiff who succeeds in one part and fails in the other parts of his demand should have his whole costs. And there is no such rule to govern this case."

LORD ELLENBOROUGH C. J. There cannot be separate judgments on one issue, and there can be but one verdict on one issue, and that is given in favour of the plaintiff.

LE BLANC J. The commissioners awarded in favour of the defendant upon his whole claim, to which the plaintiff objected, and the jury find that the commissioners were wrong in awarding to the defendant upon his whole claim. The plaintiff did not object to a part allowance, but only in respect of the entire claim.

Per Curiam, (a)

Rule discharged.

(a) Dampier J. was absent.

Monday,
Nov. 28th.

SCOTT and Another against AMBROSE.

Where plaintiff sued defendant for a debt before the bankruptcy of defendant, and went on with the suit after his bankruptcy, and had judgment, and defendant obtained his certificate and afterwards brought a writ of error; which was non-prossed, and costs of non-pross. in error awarded against him: held that the defendant was discharged by his certificate from these costs.

THE plaintiffs sued the defendant for a debt, shortly after which a commission issued against the defendant, and he was found bankrupt. The plaintiff did not come in under the commission, but prosecuted their action to judgment. The defendant obtained his certificate, and afterwards brought a writ of error in parliament upon the judgment, which writ of error was nonprossed for want of assignment of errors, and 4th

costs of non pros. in error were awarded against him. The plaintiffs having issued a fi. fa. for these costs, a rule nisi was obtained for setting it aside.

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SCOTT
et al
vs
AMES.

Marryat and *Comyn* now opposed the rule, and endeavoured to distinguish these costs from costs in the action, which they admitted had been treated in several cases as part of the original debt, and as such barred by the certificate (a). But these are costs which have accrued in a proceeding instituted after the bankruptcy, which therefore constitute a new debt. And they relied on *Ex parte Charles* (b) as overruling the former cases, and cited *Walker v. Barnes* (c), in which the case *Ex parte Charles* was recognized.

LORD ELLENBOROUGH, C. J. The decision in *Ex parte Charles*, with which I believe all the Courts in *Westminster-hall* have concurred, left untouched the doctrine that the costs shall bear relation to the original debt. In *Ex parte Charles* there was not any original debt. Here the judgment of affirmance in the House of Lords is equivalent to pronouncing judgment in the original terms, as if no such writ of error had been brought, and to that it adds the costs of affirmance.

L^{ORD} LA BLANC J. In the case cited from the Common Pleas there was no prior debt to which the costs could be attached. Here there is a prior debt.

BAYLEY J. I do not agree that costs in error are not like costs in the cause. Upon judgment of non-

(a) See *Lewis v. Piercy*, 1 H. Bl. 29. *Willett v. Pringle*, 2 N. R. 190.

(b) 14 East, 197.

(c) 1 Marshall, 346.

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pros. in the House of Lords the record is ordered to be remitted to this Court, that execution may be had on the judgment, as if no writ of error had been brought, and costs of the non-pros. are awarded. The execution which issues must be for the whole; it is one entire execution, and cannot be split for the costs in error alone, but must be for the sum adjudged below and also the costs of increase. The distinction in *Ex parte Charles* has been pointed out, and the case from the Common Pleas arose upon a verdict for the defendant, which brought it exactly to the case of *Ex parte Charles*.

Per Curiam, (a)

Rule absolute. (b)

Puller was in support of the rule.

(a) *Dampier J.* was absent.

(b) See *Phillips v. Brown*, 6 T. R. 282.

Monday,
Nov. 28th.

TAYLOR against SHAPLAND and Another.

Upon removal of a cause by certiorari out of the court of the honour of Gloucester, the pledges below are discharged by putting in and perfecting bail above.

TAYLOR attached one *Gardiner* in the court of the Honour of Gloucester, in a plea of trespass on the case on promises for 5*l.*, by virtue of which his goods were taken; and in order to prevent condemnation and obtain restitution, *Shapland* and the other defendant became his pledges, and entered into a recognizance (in the usual form in that court) to pay the damages and costs if *G.* should be condemned. *Taylor* declared against *Gardiner*, who removed the cause by certiorari into this court, and the defendants became bail here and justified, having entered into the usual recognizance,

zance, viz. to satisfy the costs and condemnation, if the defendant did not satisfy them or render himself. *Gardiner* surrendered in discharge of his bail, an exoneretur was entered on the bail-piece, and he was afterwards discharged out of custody under an insolvent act. *Taylor* having declared and obtained judgment against *Gardiner* in this court for 5*l.*, brought a scire facias against the defendants upon their recognizance in the court below, and upon nihil returned signed judgment against them, and issued execution. Under these circumstances *Marryat* on a former day obtained a rule nisi to set aside the proceedings against the defendants, upon the ground that they were not liable on their recognizance below, such recognizance having been discharged by the putting in and perfecting bail in this court.

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against
SHAYLAND.

Holroyd and *Comyn*, who shewed cause, referred to the rule of Court, that in all cases of removal by certiorari (a) special bail ought to be given. And that, they said, is required to prevent the plaintiff below from proceeding in his action; and not to discharge the bail below. And they cited *Dorrington v. Edwin* (b) to shew that in replevin, if the proceedings be removed by certiorari, the pledges in the inferior court are not discharged. And though in *Keeling v. Elliott* (c) a different rule obtained, that was because the certiorari having been brought by the plaintiff to remove his own action, he had lost his bail; but here the defendant brings the certiorari. And this hardship would attend the discharging the bail below, in this case, by the putting in

(a) *R. M. T.* 1654. s. 9.(b) *Skin.* 244.(c) *Barnes*, 399.

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bail above, that the plaintiff would by the act of the defendant be compelled to take a worse security; for by the recognizance below the bail are liable absolutely, but by the recognizance here they are only liable conditionally.

LORD ELLENBOROUGH C. J. Is it not contrary to one of the first principles of law that a person shall be *bis vexatus* in the same matter? and he is so, if his bail below remain liable after he has put in and perfected bail above. Is not the effect of putting in bail above to discharge the bail below? As to the hardship, the plaintiff must be supposed to know the consequence, when he takes the recognizance.

BAYLEY J. The distinction seems to be, that where the plaintiff removes, the bail are immediately discharged; but where the defendant removes, the bail are not immediately discharged; but there is another condition, that bail above be put in and perfected. In *Dorrington v. Edwin* it was argued by *Pollexfen* that the pledges were discharged, and he instanced the case of a *habeas corpus cum causâ*, and said that there they declare in this court *de novo*, and the proceedings in the inferior court are ended, and the bail there not answerable here, but bail *de novo* put in. And *Holt*, *contra*, "admitted the cases of *habeas corpus*; for," said he, "they declare *de novo*, and the bail in the court below are discharged; and the reason is, because the person of the party being removed hither, the inferior court had lost their jurisdiction over him; and not having jurisdiction over the person, they cannot proceed in the cause." The counsel on both sides in that case seem to be agreed as to the cases of *habeas corpus*; but *Holt* distinguishes the principal

principal case, because, "by a certiorari the record cum omnibus ea tangentibus is removed, and by it the pledges also are removed." But here the defendant has given new bail; which shews that the pledges below are discharged; for otherwise it would be unnecessary to give new bail.

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Per Curiam, (a)

Rule absolute.

N. B. Two other objections were raised upon the affidavit; one, that the damages were laid in the declaration in the inferior court at 5*l.*, but in the declaration in this court at 500*l.*: to which it was answered by the counsel, that the verdict was only for the lesser sum. The 2d objection was, that in the declaration in the court below the venue was *Thornbury*, but in the declaration here *Marshfield*; and the answer given to that was, that both venues were within the jurisdiction of the inferior court.

(a) *Dempier J.* was absent.

The KING *against* HELPS.

Monday,
Nov. 28th.

A COMMITMENT for dog-stealing, directed to the constable and the governor of the house of correction, *Coldbath-fields*, was returned upon a habeas corpus, to the effect following:

A commitment for non payment of a penalty upon conviction under stat. 10 G. 3. c. 18., (dog-stealing act.) which penalty

is to be paid, half to the informer and half to the poor of the parish where the offence is committed, is good, if it shew who the informer is and what the parish, although upon the conviction, as it is recited in the commitment, *the informer is not named*, and the justices only adjudge the penalty *to be applied in such manner as the law directs*.

The justices need not upon the conviction adjudge that if the penalty be not forthwith paid, the offender shall be committed, &c. but may, after affirmance of the conviction upon appeal, commit the offender for refusing to pay the penalty.

Middlesex

1814.

The KING
against
HELPS.

Middlesex (ff.) Whereas *Bryan Helps*, late of the parish of *Paddington*, in the county of *Middlesex*, came before us, *P. N.* and *G. F.*, two of his majesty's justices of the peace in and for the said county, and was charged, and convicted before us the said justices, at *Marlborough-street* in the said county, on the 1st of *June* 1814, upon the oaths of *I. Wilson* and others, of having, on the 16th of *May* 1814, at the parish of *Paddington* in the said county, unlawfully stolen a certain dog of the spaniel kind, the property of the said *I. W.*, from one *J. T. G.*, being a person entrusted by the said *I. W.*, the owner thereof, with the said dog, contrary to a certain act of parliament, &c. (a); for which offence we the said two justices did order and adjudge the said *B. Helps* to forfeit and pay the sum of 3*ol.* of lawful money, &c. to be applied in such manner as the law directs, and which the said *B. Helps* did neglect and refuse to pay, and did enter into a recognizance before us the said justices with two sufficient sureties for his personal appearance at the then next general quarter sessions of the peace to be holden for the said county of *Middlesex*, then and there to prosecute his appeal with effect to the said conviction, and to abide the order of, and pay such costs as should be awarded by the justices at such quarter sessions, and at which said quarter sessions the appeal of the said *B. Helps* was heard, and what was alleged by the respective parties, their counsel, and witnesses, in and concerning the premises, and it was ordered by the Court that the said conviction be, and the same was then and there affirmed; and it was further ordered

(a) 10 G 3. c. 18.

that

that the said *B. Helps* should forthwith pay or cause to be paid unto *John Tapper* the informer in that behalf 6*l.* 6*s.* for the costs and charges by him incurred in defending the said appeal, which said penalty of 30*l.* the said *B. Helps* doth neglect and refuse to pay, or cause to be paid, and also doth neglect and refuse to pay the said sum of 6*l.* 6*s.*, thereby disobeying the order of the said Court: these are therefore, in his majesty's name, to command you, the said constable, to take, &c. and you the said governor, to receive the body of the said *B. Helps* into your custody, and him safely keep without bail or mainprize for six calendar months, or until the said penalty of 30*l.* shall be paid, &c. Dated the 4th of Nov. 1814, under the hands and seals of the said justices.

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against
Helps.

Scarlett and *Andrews* took exception to this commitment, that as the statute directs the penalty to be paid, one moiety to the informer and the other moiety to the poor of the parish where the offence shall be committed, it should have been shewn by the conviction who is the informer; and then the adjudication that the penalty should be applied as the law directs would, according to *Regina v. Bartlett* (a), have been well enough. But *Rex v. Seale* (b) has decided that if the person to whom any proportion of the penalty is given be not ascertained in the conviction, it is ill. Also the justices should have adjudged in the conviction that if the penalty were not forthwith paid, the offender should be committed, &c., for so the statute directs; and it was said by the Court in *Rex v. Dimp-*

(a) *Salk.* 383.(b) 8 *East*, 568.

sey,

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 ———
 The King
 against
 Harris.

say (a), that "a judgment is an entire thing, and one part of it cannot be given at one time, and another at a subsequent time;" but here the justices have waited to make one part of their adjudication until after the appeal.

The *Attorney-General* and *Adolphus*, contra, contended that the defect, if it were one, of not naming the informer in the conviction, was cured by a subsequent part of this commitment, which points out who the informer is; for it directs the defendant to pay six guineas to *Tapper* the informer. Therefore, taking the whole commitment together, both the informer and the parish to whom the penalty is given, are ascertained, and if so, the justices adjudging the penalty to be applied as the law directs, is *ex concessis* sufficient. And the answer to the other objection is, that the defendant is not committed upon the original conviction until after the appeal, and must have been summoned again.

In reply it was urged, that to warrant a commitment there must be a lawful conviction, for though the statute as to the conviction takes away a *certiorari*, yet the commitment must contain lawful cause. And in *Dr. Groenvelt's* case (b) it was resolved, "that the cause of commitment ought to be certain, to the end that the party may know for what he suffers, and how he may regain his liberty." But if the conviction do not point out the informer, how can the party know to whom he is to pay the penalty, and regain his liberty? And the conviction cannot be helped by matter dehors; so, that

(a) 2 S. R. 96.

(b) 2 Lord Raym. 1032.

the informer being named in a subsequent part of this commitment will not remedy it.

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—
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LORD ELLENBOROUGH C. J. If the conviction formed a stage of this proceeding at which we were to stop, in order to look into its sufficiency or insufficiency, I should probably be of opinion that it ought to point out the informer. But we cannot consider the case upon the conviction; the statute has taken away the certiorari; we cannot intend that the original did not contain something more; we can only look to this ultimate proceeding. Looking, then, at that alone which is before us, we find when we come to the affirmance of the conviction upon appeal, that it does appear with sufficient certainty who the informer is. By the ultimate adjudication both the parish and the name of the informer are supplied.

LE BLANC J. The statute enacts that no proceedings touching the conviction of any offender against the act shall be quashed for want of form, or removed by certiorari. The question, then, is upon the commitment, whether the party is committed for further time than was necessary, or has notice what to do in order to procure his liberty. He is committed for six months, or until the penalty shall be paid; and I think he has notice upon the whole commitment who is the informer and which is the parish to whom the penalty is to be paid.

BAYLEY J. This is not a commitment which in itself comprizes the conviction of the offender, but the commitment recites some other conviction. And in
that

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HARRIS.

that recital it is not necessary that every thing should be stated which is requisite in the conviction itself. Therefore when the recital states that he was convicted in a penalty, to be applied in such manner as the law directs, that is perfectly consistent with its being more particularly specified in the conviction itself to whom the penalty is to be distributed.

Per Curiam, (a)

Prisoner remanded.

(a) *Dampier J.* was absent.

MEMORANDUM.

DURING the term *John Bernard Bosanquet, Esq.* was called Serjeant, and gave for his motto, *Antiquam exquirite matrem.*

END OF MICHAELMAS TERM.

C A S E S

1815.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty-fifth Year of the Reign of GEORGE III.

HULLMAN and another *against* WHITMORE. (a)
Same *against* SCOTT.

Monday,
Jan. 23d.

ASSUMPSIT on a policy of assurance, dated the 7th of February 1809, on goods on board the *Venus*, at and from *London* to any port or place in *Holland or Zealand*. The first count averred that the policy was effected by the plaintiffs as the agents

A licence granted upon the representation of *W. F.* on behalf of different *British* merchants for permitting a ship (by name) to proceed under any colours, ex-

cept the French, with a cargo of such goods as were permitted by an order in council to be exported from *London* to any ports within certain limits, the whole of the country within those limits being in hostility with this country, was held to protect the property of an alien enemy residing in the hostile country, shipped on his account in this country; and therefore an insurance for his benefit was held legal.

(a) Cause was shewn at Serjeant's Inn before this term. The report of this case is taken from the notes of a gentleman at the bar who was so kind as to attend in our absence.

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and

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HULLMAN
against
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and by the orders of *Cornelius Nolet*, and that the interest was in him; the second, that the interest was in the plaintiffs. Loss by capture. At the trial before Lord *Ellenborough* C. J., at the *London* sittings after last *Trinity* term, the material facts were these:

Nolet, who was the owner of the *Venus*, was a *Dutch* merchant, resident in *Holland*; the plaintiffs were *British* merchants, resident in *London*, and by *Nolet's* directions purchased and shipped, on his account, on board the *Venus*, a quantity of coffee and logwood, with which she sailed, on the 15th of *February* 1809, for *Zirczee* in *Holland*, under a licence. This licence was obtained, in pursuance of an order in council, by one *W. Vink*, the broker of the plaintiffs, who was employed by them to procure it; and it recited "that it had been represented to the privy council by *W. Vink* on behalf of different *British* merchants, that they were desirous of obtaining a licence for permitting the *Venus*, *Jan Pieters*, master, to proceed under any colours except the *French*, with a cargo of such goods as were permitted by virtue of an order in council of the 11th *November* 1807 to be exported, from *London* to any port between the *Texel* and *Scheidt* inclusive, with permission to include a quantity of foreign and prize colonial produce and coffee;" and the licence was granted "for the purposes set forth in the order of council, and directed the commander of all ships of war to suffer her to proceed as aforesaid, notwithstanding all the documents which accompany the ship and cargo may represent the same to be destined to any other hostile or neutral port." The ship and cargo were captured on the voyage, off the coast of *Holland*, and there was afterwards a recapture of the

ship and part of the cargo. A verdict was found for the plaintiffs.

A rule nisi for setting it aside having been obtained in the last term, upon the ground that the licence was insufficient to cover the property of *Nolet*, an alien enemy, the case was argued by *Park*, *Scarlett*, and *Barnewall*, against the rule, and by the *Attorney-General* and *Carr* in support of it. The subject was discussed at much length; but as the arguments upon it have of late been frequently noticed, and are, for the most part, to be found in several of the cases which were cited, it is conceived that a reference to those cases will be sufficient. On the one side, in support of the rule, the decisions of this Court in *Mennett v. Bonham* (a), *Flindt v. Crokatt* (b), and *Flindt v. Scott* (c), were cited; also from the Admiralty Court the cases of the *Hoffnung* (d), *Cosmopolite* (e), *Jonge Johannes* (f), *Jonge Klassina* (g), *Jonge Arend* (h), *Josephine* (i), and *Hendrick* (k). On the other side it was said that the judgment of this Court in the three cases above cited had been reversed in the Exchequer-chamber (l), and the judgment of the Court of Error was read; and *Usparicha v. Noble* (m), *Morgan v. Oswald* (n), and *Robinson v. Touray* (o), were relied on. It was also stated that in this very case the prize-court had decreed restitution of the cargo.

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Lord ELLENBOROUGH C. J. This question has been argued very fully and very ably, and I am not sorry that all the cases have been brought under review; for

(a) 15 East, 477.

(b) Ibid. 522.

(c) Ibid. 525.

(d) 2 Rob. Adm. Rep. 163.

(e) 4 Rob. 8.

(f) Ibid. 263.

(g) 5 Rob. 297.

(h) Ibid. 14.

(i) 1 Acton, Rep. 313.

(k) Ibid. 326.

(l) See *Flindt v. Scott*, 5 Tamm. 674.

(m) 13 East, 332.

(n) 3 Tamm. 554.

(o) 1 M. & S. 217.

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against
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if what we shall now do shall not be found in concurrence with some of those cases, at least it will be considered as the result of our judgment after a review of them all. It appears to me that our decision in this case will be borne out by the authority of *Robinson v. Touray*, and by a fair, plain, and naked interpretation of the licence; which seems to me to contemplate an alien interest in the subject-matter to be exported. There can be no doubt but that the crown may remit its rights; the question is, whether the crown has so done, and legalized this adventure. And it appears to me, upon referring to the words of the licence, that they do not admit of any other interpretation. The licence states it to be an adventure to hostile ports; that is, to any ports within certain hostile limits; it admits of any hostile flag but the *French*; the adventure is to be in a vessel of a particular name, and with a particular master, under any flag except the *French*. The licence is sought on behalf of different *British* merchants; and the plaintiffs answer that description; and it is not restrained as to any particular description of persons to whom the cargo shall belong, but is left open and unlimited; therefore the cargo may belong to any description of persons, unless that be qualified by other parts of this licence. I cannot adopt the phrase which has been used in argument, that as there are no express words permitting an alien interest, we cannot decide in favour of it, except upon inevitable inference to be drawn from the licence; the phrase cannot be predicated of such a subject; there is not, properly speaking, any inference which must necessarily and inevitably be drawn by all mankind. The mind of each individual must draw its own inference; and

here it is submitted to us to draw the inference; and that which I draw from the words of the licence is, that it is a licence to permit the *Venus*, J. Pieters master, to proceed under any colours except the *French*, with a certain cargo from *London* to any port between the *Tarel* and *Scheldt*. It limits the vessel by name, and describes the sort of cargo; and the adventure was beneficial to the *British* merchants, on whose behalf the licence was granted, if not in other respects at least in the way of commission: the licence looks to an exportation of our surplus produce to a hostile country; it extends to a vessel under any hostile flag except the *French*. As it has interposed only certain checks, is it not fair to conclude as to other points where it is left open, that no other restraints were intended? The object is to procure a ship-load of goods and colonial produce to be exported out of this country; the grant is somewhat more open than the prayer; the prayer is made on behalf of different *British* merchants, but the grant is for the purposes set forth, that is, for a particular ship to proceed with a cargo to hostile ports; and it is not confined to an exportation of a cargo the property of *British* merchants, on whose behalf it was applied for. The terms then being general, and no restriction being interposed, the crown must be taken to have authorized the exportation, although it should appear that the property belonged to an alien. I do not say in this case that if no *British* subject had had any connection with the adventure, or any interest in it, that that would have satisfied the terms of the licence; but here the plaintiffs are the agents of the shipper, and, as such, connected with the adventure. Upon the authority of *Robinson v. Troway*, I say this

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licence is not restrained personally to any particular class of persons; it is for a particular ship, except under a *French* flag, to proceed to enemies' ports within certain limits; and, if so, the crown must have contemplated other than *British* interests; for whose property could it be in order to secure an importation into an enemy's country, but that of an alien enemy? It appears to me, therefore, that this adventure was meant to be protected by the licence.

LE BLANC J. I perfectly agree with my Lord that the verdict is right, and that this rule ought to be discharged. This is an insurance upon goods on board the *Venus*, upon a voyage from *London* to any ports in *Holland* or *Zealand*. The ship sailed under a licence granted upon a representation made by the agent of the plaintiffs, on behalf of different *British* merchants, for permitting the ship to proceed under any colours, except the *French*, with a specified cargo, from *London* to any port between the *Texel* and *Scheldt*. The ship and goods were captured in that voyage. And the question arises on the count which avers the goods to be the property of *Nolet*, an alien enemy. The question comes to this, whether or not the government of this country, in granting this licence, meant to protect that which has been done in this case. It is to be observed, that this is not a licence to any particular persons to export their goods; it states a petition by *Vink* on behalf of different *British* merchants; but the prayer is for permitting a particular ship to proceed under any colours, except the *French*, with a cargo of goods to be exported from *London* to any port between the *Texel* and *Scheldt*; and the grant is to that effect, and
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authorizes the vessel to proceed on such voyage. On behalf of the defendant it must be shewn to the Court that this licence ought to be limited to *British* merchants only to export goods which were the property of such *British* merchants at the time of exportation; but it does not seem to me that this licence ought so to be limited. The licence is silent as to the property of the cargo to whom it ought to belong; that being so, it may be fairly asked, when we consider the object of this licence, what difference it can make whether the cargo is the property of an alien enemy at the time of its exportation from the ports of this country, or whether it becomes so upon its arrival at the port of destination in the foreign country. If there be no real difference, as it affects the purposes of the licence, then the case of *Robinson v. Touray* does not differ in principle from this. That was a licence on the petition of a *British* merchant to import into this country a cargo from a foreign country in hostility with this, and the cargo was the property of an alien enemy, a subject of that country; nevertheless it was considered that the licence protected the importation of it into this country, not being confined to the *British* merchant; and if that licence was held good to protect such a cargo, so ought this, which authorizes the exporting a cargo to a hostile country. So far it appears to me that the principle of that case is an authority upon the present question.

BAYLEY J. This case has been so fully entered into by my Lord and my Brother LE BLANC, that I cannot add any thing. I think the true construction of the licence is this, that it was not intended to impose any

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restriction as to whom the property should belong. The case of *Robinson v. Touray* would be sufficient upon this point, but there are other cases in *C. P.* to the same effect. (a)

DAMPIER J. That also seems to me to be the true construction of the licence: a consignment to a hostile country would naturally be a hostile interest, and there is so much generality in the terms of the licence as to make it not an unreasonable construction that a hostile interest was contemplated.

Rule discharged.

(a) See *Morgan v. Oswald*, 3 *Tonn* 554. *Feise v. Bell*, 4 *Tonn* 4.

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Jan. 23d.

Cox and Others against PRENTICE. (a)

Where defendant received from his principal abroad a bar of silver, and took it to plaintiffs, who melted it, and sent a piece to an assayer to be assayed at defendant's expense, and paid a price for the bar to defendant, as for the number of ounces of silver which by the assay it was calculated to contain, which number was afterwards discovered to exceed the true number: Held that plaintiffs might, after having offered to return the bar, have money had and received against defendant for the price thus paid to him under a mistake, although defendant had forwarded his account to his principal, and in it had placed the price received to the credit of his principal.

ASSUMPSIT. The plaintiffs declared that in consideration that they would buy of the defendant a bar of silver, the defendant undertook that it contained 4 oz., whereas it contained only 2 oz. There were other special counts, with the money counts. Plea, non-assumpsit. At the trial before Lord *Ellenborough* C. J., at the *London* sittings the case was this:

The plaintiffs were gold refiners, and the defendant was a watchmaker, and had a correspondent at *Gibraltar*,

(a) Cause was shewn at Serjeant's Inn before this term. The report of this case is taken from the notes of a gentleman at the bar, who was so kind as to attend in our absence.

from

from whom he was in the habit of receiving broken metal. His correspondent remitted to him a bar of silver, which he carried to the plaintiffs' house, and they melted it down in his presence. The plaintiffs afterwards procured it to be assayed by a third person, who was paid by the defendant; and the plaintiffs paid to the defendant 88*l.* and a fraction, the supposed value of the silver, according to the assay-master's certificate. The defendant informed his correspondent of what had been done, and credited him in his account with the amount. The plaintiffs sold the silver to a house at *Birmingham*, who afterwards returned it, representing that it did not answer the assay; upon which the plaintiffs applied to the defendant for a return of the money, offering to return him the silver; but the defendant refused to return the money, on the ground that he had forwarded his account to his correspondent, in which he had credited him with the full sum. It appeared, however, that the account was still unsettled between them. The assay-master proved that he received a small piece of the silver for the purpose of assaying it; that he by his assay made the whole 4 oz., whereas 2 oz. 7 dwts. was the true assay. A verdict was found for the plaintiffs for the difference in value between the supposed and true weight, with liberty to the defendant to move for a nonsuit. A rule nisi was accordingly obtained in *Michaelmas* term upon two grounds; 1st, that the action would not lie at all even supposing it to have been brought against the defendant's principal; 2dly, supposing it would lie against his principal, yet it would not against the defendant, who was merely an agent, and whose situation had been altered between the

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the time of the sale and action by his having accounted for the sale money with his principal.

The Attorney-General, Park, and Marryat shewed cause, and upon the first point they argued that here the mistake, admitting there was no fraud, was caused by the error of the assay-master; who, being paid by the seller, was to be considered rather as the seller's agent than the agent of the plaintiffs. If so, then it is the same thing as if the seller himself had made the assay, and is like the case of a sale by sample, where there is always an implied warranty from the seller that the whole article shall correspond with the sample. And such an implied warranty will sustain the special counts. But supposing the assay-master to be the common agent of both parties, then it is like the case of money paid under a mistake of the fact, and may be recovered under the common counts. Upon the second point they denied that the defendant was, at the time of action brought, to be considered merely as an agent, there being nothing to shew that at that time his principal was disclosed; but admitting that he was, the case of *Buller v. Harrison* (a) shews that if this money has been paid by mistake to the agent, and has not been paid over by him to his principal, it may be recovered back from him in an action for money had and received, although he may have placed it to the account of his principal. Therefore the alteration in the defendant's situation by his having accounted for the sale money makes no difference.

(a) *Cowp.* 566.

Topping and *Comyn*, contra, maintained that the principal himself would not have been liable; for as to the warranty upon the special counts, beside that the case at the trial proceeded altogether upon the count for money had and received, there is no pretence for saying that the principal or his agent held out a sample, as an affirmation of the value of the silver. The seller at the time of the sale is ignorant of the value, and submits it to the plaintiffs, who, in order to ascertain it, have recourse to a third person of their own choice, and by his assay the price is fixed. And even if the seller had affirmed that it was of a particular value, still, according to *Chandelor v. Lopus* (a), that would not have made him liable, unless he knew it not to be of that value, or warranted it to be so. This then is the case of a simple sale between parties who are to ascertain, each for himself, the value of the thing sold; to which the maxim, caveat emptor, applies. The buyers have fixed the price by the estimate of their own valuer; and there is not any authority for allowing parties to recover back money paid through their own mistake and laches. Or supposing him to be the valuer for both parties, if two persons agree to be bound by the judgment of a third, his judgment shall be conclusive between them. In like manner here, there being no fraud, it shall be conclusive. But 2dly, granting that the action would have lain against the principal, it would be hard if the agent was to remain liable after he has accounted for the proceeds of the sale with his principal. *Buller v. Harrison* is no authority for any such position; for it turned altogether upon the fraud.

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(a) Cro. J. 4.

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Lord *Mansfield* gives the clue to that decision, when he asks, "Is it conscientious that the Defendant should keep money which he has got by their (the principals) misrepresentation?" And though it may be said that the defendant in that case was no party to the fraud, yet when he endeavoured to retain the money which he had gotten through the medium of a fraud, he made himself a party to it. That case therefore is as widely different from this, as fraud is from no fraud. Here the question is, whether the agent, after having accounted with his principal for the proceeds of the sale, shall be forced by the vendees, in consequence of their own mistake, to litigate, not his own rights, but those of his principal.

Lord ELLENBOROUGH C. J. I take it to be clear, that an agent who receives money for his principal is liable as a principal so long as he stands in his original situation; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. Here it is admitted that no money has been paid over by the Defendant to his principal, nor has there been any other thing done by him to create a change of circumstances. The only question then is, whether the action lies against the Defendant, considering it as if it were an action against the principal. Now this is a case of mutual innocence and equal error, which is not an unusual case for money had and received. Much of the argument has been raised by the circumstance of a third person having been introduced into this transaction; but the nature of the commodity made the intervention of some other standard than the parties' own judgment necessary. And whether that be attained by means of
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a pair of scales, or any other common measure, or whether an assay-master be employed for the purpose, being equally necessary, it can make no difference. Let us then put the case of parties agreeing to abide by the weighing of any article at any particular scales, and in the weighing an error, not perceived at the time, takes place from an accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, would not in that case money had and received be sustainable? But it has been argued, as if the assay-master's not having the whole bar was imputable to the laches of the plaintiffs. But the assay-master might have chosen his own course; it was for him to determine what he wanted. If indeed he is to be considered as the agent only of one party, I rather think he was the agent of the defendant; but I take him to have been the agent for both. Our decision will not clash with the rule, *caveat emptor*; for here both parties were under a mutual error, neither of them being to exercise nor exercising any judgment upon the subject. I think this is the proper case for money had and received.

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LE BLANC J. The circumstance of the account between the defendant and his principal being still open without any new credit given, does, I think, according to *Buller v. Harrison*, dispose of the objection upon the 2d ground. That brings it to the principal question. Now upon that, as a general proposition, it may be true that when an article is sold, which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back. But that is a rule applicable only to cases where the thing

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thing is of an arbitrary value; and the fallacy lies in applying the rule of law to this case when the thing is not of an arbitrary value, but depends upon the quantity of silver it contains. It is just like the case of a purchase of any commodity by weight, the price of which is to be fixed by the weighing; and if the weight turns out to be less than that paid for, can there be a doubt that the party selling is bound to refund? So here the price was to be fixed by the quantity of silver to be ascertained by the assay of the assay-master.

BAYLEY J. I have no doubt that this action for money had and received will lie, and that the defendant is liable. The assay-master was a middle-man; or, if he was the agent of either, he was more so of the defendant than of the plaintiff. The rule, *caveat emptor*, does not apply to this case; for neither party exercised his own judgment. What did the plaintiff bargain to buy and the defendant to sell? They both understand that the one agreed to buy and the other to sell a bar containing such a quantity of silver, as should appear by the assay; and the quantity is fixed by the assay, and paid for; but through some mistake in the assay the bar turns out not to contain the quantity represented, but a smaller quantity. The plaintiff therefore may rescind the contract, and bring money had and received, having offered to return the bar of silver. Upon the 2d point, *Buller v. Harrison* is precisely in point. That case decides that if things remain in the same state, as they did here, the action will lie against the agent.

DAMPFER J.

DAMPIER J. It appears to me that this rule ought to be discharged. As to the objection that the defendant is the agent; as things remained unaltered between the agent and his principal, it seems that the action lies against the agent. As to the principal point, it is clear that neither the one party bargained to buy nor the other to sell any thing upon their own judgment, or until the bar was melted down, and assayed by the assay-master. The bargain was for a bar of silver of the quality ascertained by the assay-master, and it is not of that quality. It is a case of mutual error.

Rule discharged.

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GRANT *against* DA COSTA. (a)

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Jan. 23d.

UPON a rule for entering a nonsuit, upon an alleged variance at the trial of this cause before Lord Ellenborough C. J. at the *London* sittings after last *Trinity* term, the case was this: the plaintiff declared that one *J. B.* drew a bill of exchange on the defendant, by which he required him, three months after date, to pay to *T. G. B.* or order 315*l.* 10*s.* *for value received by the said J. B.*, which the defendant accepted, &c. The bill produced was thus: "Three months after date pay to *T. G. B.* or order 315*l.* 10*s.* value received;" and was subscribed *J. B.* And it was contended that here was a variance, inasmuch as "value received" did not import value received by *J. B.*, but value received of *J. B.* by the acceptor.

A bill of exchange in this form: "Pay to *T. G. B.* or order 315*l.* value received," and subscribed by the drawer, may be alleged in pleading to be a bill of exchange for value received by the drawer.

(a) Cause was shewn at Serjeant's Inn before this term.

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The Attorney-General and *J. Parke*, who shewed cause, agreed that "value received" was capable of both senses, either value received by the drawee of the drawer, or value received by the drawer of the payee; they urged, however, that the latter sense was the most reasonable, because, as the drawee must know whether he has value of the drawer in his hands, it would be needless to inform him. And if the words are capable of both senses, it is sufficient that the declaration has adopted one of them.

Park (with him *Abbott*), *contra*, maintained, that "value received" did not necessarily mean value received by the drawer; for if the bill had been payable to the drawer's own order, it would not have so meant, but must have meant value received by the acceptor. Therefore if the declaration purports to set out a bill of a particular denomination, it is not sufficient to prove a bill which is capable of a different denomination.

LORD ELLENBOROUGH C. J. It appears to me that value received is capable of two interpretations, but the more natural one is, that the party who draws the bill should inform the drawee of a fact which he does not know, than of one of which he must be well aware. The words "value received" are not at all material; they might be wholly omitted in the declaration, and there are several cases to that effect (*a*). The meaning of them here is that *J. B.* informs the drawee that he draws upon him in favour of *T. G. B.* because he has received value of *T. G. B.* To tell him that he

(*a*) See *White v. Ledwick*, *Bayley on Bills*, 3d ed. 16. n. (3), and the cases there cited.

draws

draws upon him, because he, the drawee, has value in his hands, is to tell him nothing; therefore the first is the more probable interpretation.

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BAYLEY J. The object of inserting the words "value received" is to shew that it is not an accommodation bill, but made on a valuable consideration given for it by the payee.

Per Curiam,

Rule discharged.

DOE, on the Demise of GOODBEHERE, *against* Monday,
BEVAN. (a) Jan. 23d.

EJECTMENT for a messuage and land at *Lambeth*.

At the trial before *Heath J.* at the last *Surry* assizes the case was this:

Goodbehere by indenture of the 29th *November* 1808 demised the premises in question, being a public house, &c., to one *Shaw*, for a term of years, and *Shaw* covenanted that he, his executors, administrators, or assigns, should not nor would during the term assign the indenture, or his or their interest therein, or assign, set, or underlet the messuage and premises, or any part thereof, to any person or persons whatsoever, without the consent in writing of the lessor, his executors, administrators, or assigns. Proviso, that in case *Shaw*, his exe-

Demise for years to *S.*, and *S.* covenants that he, his executors, administrators, or assigns, would not assign the indenture, or his or their interest therein, or assign the premises to any person whatsoever, without consent in writing of lessor. Proviso that in case *S.*, his executors, administrators, or assigns, should part with his or their interest contrary to his

covenant that lessor might re-enter. *S.* deposited the lease as a security for money borrowed, and became bankrupt, and the lease was sold by direction of the Chancellor to pay that debt. Held that the assignees under the commission might assign the lease to the vendee without consent of lessor.

(a) Cause was shewn at Serjeant's Inn before this term.

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cutors, administrators, or assigns, should part with his or their interest in the premises, or any part thereof, contrary to his covenant that the lessor might re-enter. Afterwards *Shaw* deposited this lease with *Whitbread* and Co. as a security for the repayment of money borrowed of them; and becoming bankrupt, and his estate and effects being assigned by the commissioners to his assignees, the lease was upon the petition of *Whitbread* and Co. directed by the Lord Chancellor to be sold in discharge of their debt, and was accordingly sold to the defendant, and without the consent of *Good-behere* assigned to the defendant by the assignees, and he entered, &c. The learned Judge ruled that this was not a breach of the proviso not to assign without consent, &c. inasmuch as the covenant did not extend to *Shaw's* assignees, they being assignees in law; wherefore he directed a nonsuit.

Knowlys in the last term obtained a rule nisi for setting the nonsuit aside, and he said the contrary to what had been ruled at the trial was determined in *Sir W. More's* case (a); and Lord *Hardwicke* also was of opinion in *Philpot v. Hoare* (b), that if the covenant in that case had named assigns, the assignee of the bankrupt would have been bound by it.

Best Serjt. and *Espinasse* shewed cause, and argued that this proviso only applied to acts that the party does voluntarily, but not to those that pass in invitum; which distinction governed the decision of *Doe v. Carter* (c), where all the principal cases are collected, and

(a) *Gr. Eliz.* 26.(b) 2 *Atk.* 219.(c) 8 *T. R.* 57.

was recognized by the Master of the Rolls in *Weatherall v. Gearing* (a). And the same distinction will hold in the case of an assignment under a commission of bankruptcy, that being done by virtue of the statute, and not by the act of the party; and of such opinion was Lord Macclisfeld in *Goring v. Warner* (b). In *Amb.* 480., where *Philpot v. Hoare* is more fully reported than in *Atk.*, Lord Hardwicke expressly stated that "he was of opinion that a covenant by a lessee not to assign without licence did not bind the assignee of the lessee who became bankrupt, at law;" and the only reason why he set the assignment aside in that case was because of the fraud. In *Crusoe v. Bugby* (c), which was a covenant "not to assign, &c. or otherwise do or put away the indenture of demise," the Court in giving judgment enumerate several modes by which a term may be put away, and among others, that "the lessee becoming bankrupt is a doing or putting away;" but yet they add, "none of these amount to an assignment, or to a breach of the covenant or condition." Then if the assignee of the bankrupt may take, without incurring a forfeiture, it follows that he may assign; because he takes nothing for his own benefit, but only as the channel of conveyance to the whole body of creditors; and therefore it would be absurd to hold that he cannot assign. Also the depositing of the lease originally with *Whitbread and Co.* was not a forfeiture; for the courts have always looked narrowly into these provisoes; and here are no words that the lessee shall not *part with the indenture*, but only that he shall not part with his interest. And though the depositing this lease might create

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(a) 12 Ves. 513.

(b) 7 Vin. 85. pl. 9. 2 Eq. Cas. Ab. 100.

(c) 3 Will. 234.

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an equitable mortgage, in favour of *Whitbread and Co.*, it conveyed no legal interest.

Knowllys and *Lawes* contra, in addition to the authorities mentioned upon moving for the rule, cited *Moore*, 44. pl. 136. "That a covenant by the lessee for him and his assigns will bind his administrator;" yet they said, an administrator is as much an assignee appointed by statute, as the assignee of a bankrupt. And if *Doe v. Carter* had decided that *Carter* might have assigned, it would have been in point; but as it is, it only shews that here the assignment to the assignees, which is by operation of law, is not within the proviso, but not that the assignees may assign without the consent of the lessor. If they may, this absurdity will follow, that the assignees will be in of a better estate than the bankrupt himself. But in 7 *Vin.* 85. pl. 10. it is laid down, "that the law is very clear that the assignees are exactly in the same place as the bankrupt, and stand in his place to every particular, and any agreement entered into shall bind them." If therefore the bankrupt has only a qualified estate, his assignees can have no more; and though they may part with it, yet they must do so in such manner and upon such conditions as the bankrupt has agreed to do. There is no question but that they may assign; the only question is as to the mode by which they must exercise their right. The distinction is, that if the proviso extend to the lessee only, then the assignees in law are not within it, and they may assign without consent without incurring a forfeiture, *Dyer*, 65. b. pl. 8. and *Cox v. Brown* (a); but it is otherwise if they be named, for

(a) 1 *Ch. Rep.* 170.

then

then they as well as the lessee are bound by it. That was so held in *Roe v. Harrison* (a), which was a covenant for the lessee, his executors and administrators, and the administrator underlet; and per *Buller J.* "this assignment is by the act of the party himself, and the executors and administrators are expressly named in the covenant." And here the covenant names the lessee and his assigns, and the assignment is by the act of the assignees; so that *Roe v. Harrison* is expressly in point. And no inconvenience will follow from holding the assignees within this clause of restraint; because if the lessor should withhold his consent capriciously, doubtless a court of equity would interfere. *Roe v. Galliers* (b) has determined that there is nothing unlawful in the lessor's imposing such a restraint.

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Lord ELLENBOROUGH C. J. I had understood it to be a point long settled, that a landlord has the power of restraining the alienation of his tenant by a general proviso against alienation, which is applicable to ordinary cases; and that in extraordinary cases, such as the bankruptcy of his tenant, he may restrain the alienation by an express proviso. We are now upon the consideration of a case which has not any express proviso, but stands on the effect of the ordinary clause restraining the tenant, his executors, administrators, or assigns from assigning. In *Roe v. Harrison* the proviso extended to the lessee, his executors and administrators, expressly restraining them by name from alienation; therefore it was held that the administrator could not assign. Here the question is upon the

(a) 2 T.R. 425.

(b) *Ibid.* 133.

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meaning of the term assigns, whether by that term the proviso was meant to have effect against assigns in law, as it would have against assigns by act of the party. Now the Courts have construed it to mean voluntary assigns as contradistinguished from assigns by operation of law, and further than that, that the immediate vendee from the assignee in law is not within the proviso; the reason of which is, that the assignee in law cannot be encumbered with the engagement belonging to the property which he takes, such as in this case the carrying on the bankrupt's trade in the public house, which is a strong instance. In such cases, therefore, the law must allow the assignee to divest himself of the property, and convert it into a fund for the benefit of the creditors. That "assigns" does not relate to assignees in law, I consider as determined in *Doe d. Mitchinson v. Carter*, and *Goring v. Warner*, but more distinctly in *Doe v. Carter*. Nor do I find that *Roe v. Harrison* impugns these authorities, because that passed entirely on the ground of the executors and administrators being specially named. But an executor is a volunteer, he is at liberty to renounce, and an administrator is wholly voluntary; therefore it does not follow from that decision, that "assigns" must necessarily comprehend such as are involuntary and do not come in by the act of the party, as the assignees under a commission of bankruptcy do not. This case, therefore, appears to me to be concluded by the authorities, as well as by the reason of the thing. Here, if the assignees might of themselves assign the terms, they might certainly do so under the Chancellor's order.

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LE BLANC J. There can be no doubt that the lessor might have relieved himself from all inconvenience by expressly providing in the lease that if the lessee should become bankrupt, or should deposit the lease with any person, the lease should be void. In this case he has not so done, but has contented himself with a covenant from the lessee for himself, his executors, administrators, and assigns, not to assign the indenture, or premises, without the lessor's consent. And the question is, if it be a breach of covenant in the assignees of the lessee, who has become bankrupt, to assign the lease. It is clear that there has been no assignment by the lessee himself; it is also clear that the lessee's becoming bankrupt is not a breach; but the assignees under the commission have assigned. They were bound to assign, because they took only as trustees for the purpose of disposing of the property to the best advantage for the benefit of the creditors; and they were compelled under an order of the Court of Chancery to sell in discharge of the debt of *Whitbread and Co.* Therefore this was not an assignment within the meaning of the covenant, because in *Doe v. Carter* it was considered that an assignment under compulsion of law by the sheriff to an execution-creditor was not within a general covenant by the lessee, his executors, administrators, and assigns, not to assign. In this case the commission of bankruptcy is a statutable execution, and there is not any material difference between the compulsory course under which the sale was made in both cases. *Roe v. Harrison* is very distinguishable from the present case, for there the administrator being expressly named in the covenant not to let, did by his own act underlet; he did not come in like the assignees

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of a bankrupt under a statutable execution, and act under it by compulsion of law; but being expressly bound by the covenant, it was holden that he could only convey in the same manner as his intestate, the covenantor. But the assignees of a bankrupt, in like manner as the sheriff, are relieved from the operation of the word *assigns*, because "*assigns*" means only such as are voluntary assigns. Therefore, both on the authorities and upon principle, I think there is no doubt.

BAYLEY J. I think this case admits of no reasonable doubt. If the decision of *Doe v. Carter* is correct, this decision also must be supported. Following that decision, I say, in this case, that there has been no such assignment as was intended to be guarded against by this proviso. In *Doe v. Carter* it was decided that a proviso, that if the lessee, his executors, administrators, or assigns, should assign, the landlord might re-enter, contemplated only a voluntary assignment, and not one which passed in invitum of the lessee, and where the party making the assignment acted in discharge of a duty cast upon him by the law. It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and if it be not, what act has the lessee done to avoid it? All that has followed upon his bankruptcy is not by his act but by the operation of law, transferring his property to his assignees. Then shall the assignees have capacity to take it, and yet not to dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their hands to the prejudice of the creditors, for whose benefit the law originally cast it upon them?

Undoubt-

Undoubtedly that can never be. They must, therefore, have a power to sell for the purposes for which it was given them, and the Chancellor will compel them if they neglect to do it. It appears that the Chancellor has directed this lease to be sold, and that so far from being volunteers they acted under the compulsion of this order. If "assigns" means voluntary assigns, what act is there to make them voluntary? This is no new law; it is as old at least as *Goring v. Warner*. The same was so considered in *Crusoe v. Bugby*, and it was said and admitted that a devise of the term by the lessee is not a breach of the covenant not to assign. Such also has been the general impression in the minds of the profession for a long series of years. Parties may, if they please, stipulate by a special proviso that the lease shall determine upon the bankruptcy of the lessee; that indeed was doubted until *Roe v. Galliers* established that it was not a stipulation against law; but the very doubt shews that it never could have been conceived that the general proviso extended to restrain an assignment under a commission of bankruptcy. The distinction in *Roe v. Harrison* is, that there was such letting by the act of the party as the party covenanted against.

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DAMPIER J. I think the case of *Doe v. Carter* establishes, upon a review of all the cases, this position, that the assignees of a bankrupt lessee, whose assignment is not voluntary, but passes in invitum, and by operation of law, are not within the general word "assigns" in this proviso. It is not pretended that the assignment by the commissioners to the assignees is a breach of the proviso, but it is said the assignment by the
assignees

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assignees afterwards is their own voluntary act. But what is the duty of the assignees? They would incur a great risk if they did not so manage the estate of the bankrupt as to fulfil their trust: consequently they were bound at their own peril to assign over the term for the benefit of the creditors; and moreover they are compelled to it in this instance by the Chancellor's order for the benefit of one particular creditor; which they of course would resist as far as they could in order to have it for the benefit of the whole body of creditors. This case, therefore, falls within the reason of *Doe v. Carter*, upon the authority of which, I think this assignment is not within the proviso. The bankruptcy of the lessee might have been specially guarded against as in *Roe v. Galliers*.

Rule discharged,

Mondry,
Jan. 23d.

BISHOP *against* Rowe. (a)

Same *against* BAYLY.

Where the holder of a bill of exchange upon its being dishonoured received part payment, and for the residue another bill of exchange, drawn and accepted by persons not parties to the original bill, and afterwards sued the drawer and acceptor upon the original bill: Held that it was sufficient for him to prove presentment of the substituted bill to the acceptor for payment, and that it was dishonoured, without proving that he gave notice of the dishonour to the drawer of the substituted bill.

ASSUMPSIT on a bill of exchange for 200*l.* dated the 27th of *January* 1812, drawn by *E. S.* as agent of the defendant *Rowe*, payable to the defendant's order, two months after date, at Messrs. *Hayters, London*, accepted by *J. Bayly*, and indorsed by the defendant. The se-

(a) Cause was shewn at Serjeant's Inn before this term.

cond

cond action was upon the same bill against *Bayly* the acceptor.

At the trial before *Gibbs* C. J. at the last *Devon* assizes, the case in substance was this :

The bill being in the hands of the *Torquay* bank, of which firm one *Tucker* was a partner, *Tucker's* son together with the plaintiff's son discounted it for *Tucker* with the *Dartmouth* bank, striking out *Tucker's* name, which was at that time indorsed, and indorsing the plaintiff's name; which indorsement the plaintiff adopted. The bill when due was presented and dishonoured, and due notice thereof given by the *Dartmouth* bank to the defendant. The defendant wrote to them stating that the money had been remitted by *Bayly* the acceptor to the *Torquay* bank; and a day or two afterwards the *Torquay* bank remitted to the *Dartmouth* bank 100*l.* and promised to pay the residue. The *Dartmouth* bank applied to the plaintiff for the residue, and the plaintiff applied to *Tucker*; who gave him a bill for 100*l.* drawn by himself on one *Lewis* in *London*, at two months, payable to the plaintiff, which the plaintiff indorsed and carried to the *Dartmouth* bank. This bill was also presented for payment and dishonoured, but no notice of the dishonor was given to *Tucker*. And it was insisted by the defendant that by reason of this want of notice to *Tucker* the drawer of the substituted bill, the plaintiff could not recover upon the original bill, inasmuch as the second bill being substituted for the original bill pro tanto, the plaintiff was bound to go through all the proof which would be necessary to entitle him to recover upon the substituted bill. The learned Judge directed a verdict for the plaintiff, reserving the point.

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 against
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Accord-

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Accordingly a rule nisi was obtained in the last term for entering a nonsuit.

Lens Serjt. (with him *Moore*) shewed cause, and contended that the plaintiff was not bound to do more than present the substituted bill for payment; and that upon its dishonour he was remitted to his rights upon the original bill. It is true that in order to pursue his remedy upon the substituted bill against the drawer, he must have given notice but he was not bound to proceed on the substituted bill; which was not substituted in all events for the original bill, but only in the event of its being paid (*a*), and in the mean time the plaintiff's rights upon the original bill to be suspended. Therefore when that which was substituted has failed, the original right shall revive. And that has failed, which being given in order to be productive at a particular time, has not been productive at that time. Wherefore it is sufficient for the plaintiff to have proved presentment, and upon presentment that payment was refused.

Jekyll and *Gifford* contra, argued that the original bill was satisfied. They said that though *Tucker's* name was not now on the original bill, yet the whole transaction having been with him and on his account, it must be considered the same as if his name were upon it. And assuming his name to be upon the original bill, doubtless whatever laches would discharge him from the payment of the substituted bill to the plaintiff, would likewise discharge him from the payment of the original bill; because the plaintiff having agreed to a substituted payment, if he afterwards dis-

(a) See *Salk.* 124. 442. *Skin.* 410.

charge

charge him from the thing substituted, he discharges him from the original thing. Then if *Tucker* would have been discharged from the original bill, the defendant would also have been discharged, because satisfaction to any one party to a bill is satisfaction to all. And the Court held upon a former occasion that the plaintiff was bound to prove a presentment of the substituted bill, for they sent the case to be retried, because that proof was wanting. Now that could only have been done for this reason, that the plaintiff was bound to shew that he had used due diligence; and for the same reason also he shall be bound to prove notice of its dishonour. According to *Hebden v. Hartsinck* (a), if a party take a bill in payment of a debt, the Court will presume the money was received unless the contrary be shewn; but here the contrary has not been shewn, if the plaintiff has failed in proving any of the necessary steps; therefore the Court will presume payment.

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LORD ELLENBOROUGH C. J. It appears to me that inasmuch as *Tucker's* name was not on the original bill, he is to be considered only as a person intervening to pay by the means of *Lewis*, and if *Lewis* had paid, it would have enured to the satisfaction of this bill. But the provision of the statute is (b), "if any person accept any bill for and in satisfaction of any former debt, &c. the same shall be esteemed a complete payment of such debt, if the person doth not take his due course to obtain payment thereof, &c." I cannot say that this bill was accepted for and in satisfaction of a former debt. This was not a bill between parties standing in

(a) 4 Esp. N. P. C. 46.

(b) 3 & 4 Anne, c. 9. s. 7.

the

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the relation of debtor and debtee; *Tucker* was a person intervening. The bill was accepted by the plaintiff for the chance of its being productive; the plaintiff might have returned it presently or within a reasonable time, and if he did not, he was bound to go on, and see if it would be paid on its becoming due. He does go on, and applies for payment, and then the bill is dishonoured; unless the party had received it in satisfaction of an antecedent debt he was not bound to go farther. I do not know that when a party brings his action on a bill of exchange, he is bound to pursue the evidence farther than what applies to the particular bill in suit: there is no decision that I am aware of which goes the length now contended for. Suppose an action to be brought upon a bill of exchange, which has been backed by another bill given, and for which second bill a third has been substituted, and so on through a series of bills, is the plaintiff to be compelled to pursue his evidence in infinitum through all the different stages of the substituted bills? I am inclined to think that he is not obliged to go farther than what concerns the bill in suit, especially where the name of the person is not on the bill: a demand should be shewn, but that has been done here. At the same time this is rather a new case, and I have not that confidence which I should expect to have on the subject of bills of exchange if it were a case of former occurrence; but the inclination of my opinion is, that the plaintiff has done enough.

LE BLANC J. The case now before us is that of an action by the holder against the drawer; and there is another action also on the same bill against the ac-

ceptor. 100*l.* only have been paid on this bill, and 100*l.* more remain due upon it. The defendant sets up as a defence payment of the whole bill; and in order to prove payment of the second 100*l.*, he proved that after the bill in question was dishonoured the holders of it received a bill for 100*l.*, which bill, if paid, would have satisfied it. When the substituted bill became due it was presented for payment, and payment was refused. And the only question is, if that be sufficient proof for the party in this action to negative the presumption of payment arising from the delivery of the bill: the question is, whether the plaintiff should have gone further and proved notice of dishonour. If this had been an action against *Tucker* on the substituted bill, there is no doubt the party could not have succeeded without proving notice, unless he could have shewn that *Lewis* had no effects. But there is this difference here, that the action is not on that bill, but on the original bill against other parties, in respect of which the plaintiff has regularly pursued all the necessary forms. In answer to this, the delivery of the substituted bill is insisted on as payment; but it is no payment of the original bill, unless something has been done to discharge the party to this action from that bill. If he could have shewn that by the laches of the plaintiff in the course of this negociation he had lost 100*l.*, or that he had been prevented from suing on the 100*l.* bill, he might have made out a defence; but not having shewn that, it seems to me that the plaintiff has done all, by presentment of the bill, that it was incumbent on him to do. It was not incumbent on him to do more, unless he meant to pursue his remedy on the substituted bill. If he had meant to

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sue on that, undoubtedly he must have gone further; but as it is, unless payment be shewn to have been made it shall not avail as a good defence.

BAYLEY J. It seems to me that the defendant has not made out that the substituted bill was paid, nor that such circumstances have taken place as amount to satisfaction. It is true that the onus of proving all the facts necessary to support the action lies on the plaintiff; and therefore where the action is against an indorser or drawer, it is incumbent on the plaintiff to prove notice, because without notice he has no right to enforce payment either against the drawer or indorser. But here the onus of proof lies on the defendant; who is to substantiate his defence. He undertakes to say that the substituted bill has been in effect paid by *Tucker*, and that he will make that out. But how does he do so? It appears that the plaintiff received from *Tucker* a bill of exchange drawn on *Lewis*; that, however, is no proof that it was paid. The plaintiff denies that *Lewis* did pay; he says, I presented it, and *Lewis* refused payment. But to this the defendant answers, that circumstances may have occurred to entitle me to consider it as paid, and you by your laches have made the bill your own. If he is to insist on this, why is not the onus of proof to lie on him? It is a matter which does not lie peculiarly within the plaintiff's knowledge. There is a party who might have proved it; *Tucker* might have proved that he had effects in the hands of *Lewis*, and that the plaintiff did not give notice. Either *Tucker* or *Lewis* might have proved effects, and *Tucker* might have proved the want of notice. If he had proved that, the

plaintiff would have lost his remedy; but inasmuch as there is no such proof, we are not warranted in concluding that there have been sufficient laches to operate as a discharge between *Tucker* and *Bishop*. If this action had been against *Tucker* it might have made a material difference; because as *Tucker* could not have been called as a witness, the jury might perhaps have been warranted in concluding that notice had not been given. But where *Tucker* might have been called they could not be warranted in this conclusion.

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Rule discharged. (a)

(a) *Dampier J.* was absent from Serjeants' Inn.

FIGGINS *against* COGSWELL. (a)

Monday,
Jun. 23d.

SLANDER. The plaintiff declares that before and at the time of speaking and publishing the several words, &c. he was, and from thence hath been, and still is, a carpenter and *sworn appraiser*, and had been retained and employed by one *Heale* to do the carpenter's work upon a house, which *Heale* had contracted with the defendant to build; and that the defendant, intending to injure him in his several trades as aforesaid, and to prevent persons from employing him in the way of his said several trades, in a certain discourse which he had of and concerning the plaintiff in his

In slander, the declaration alleged that the plaintiff at the time of speaking, &c. was of two trades, and that defendant, intending to injure him in his several trades as aforesaid, and to prevent persons from employing him in the way of his said several trades, in a certain discourse which he had of and concern-

ing the plaintiff in one of his trades, spoke, &c. Held that though the plaintiff failed to prove he was of both trades, yet he might recover upon proof that he was of that trade concerning which the defendant was charged to have spoken the words.

(a) Cause was shewn at Serjeants' Inn before this term.

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aforesaid trade of a carpenter, and of and concerning the aforesaid work, spoke these words: "*Figgins and Heale* are rascals and rogues, and have robbed me of 50l.," &c. and the plaintiff alleges for special damage that one *J. M.* omitted to employ him as an appraiser. Plea, general issue. At the trial before *Dampier J.* at the last *Wills* assizes, the plaintiff failed in proving that he was a sworn appraiser; whereupon his counsel proposed to waive the special damage, and rest the case upon the proof of his being a carpenter, and that the words were spoken of him in his trade of a carpenter: but the learned Judge being of opinion that the allegation that he was a sworn appraiser was material, directed a nonsuit.

Lens Serjt. moved in the last term to set the nonsuit aside, contending that it was enough to sustain this action that the plaintiff had proved one branch of the allegation, which was inducement only, though he admitted that by reason of not proving that he was an appraiser, the plaintiff could not recover for special damage.

Casberd (with him *Pell Serjt.*) who shewed cause, urged that the allegation was entire, and so connected with the charge that it could not be severed. The charge is that the defendant, intending to injure him in his several trades, and to prevent persons employing him in his several trades, spoke the words; and therefore although it is charged that the defendant spoke them concerning one of his trades only, yet being laid as spoken with a double intent, the plaintiff was bound to prove the speaking of them in the manner laid;

which could only be by proving that he was of both trades.

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But *per Curiam*, This is a partible allegation. And they mentioned the instance of post-office indictments, where, though the person is charged as having been employed in several of the capacities named in the statute; yet he may be convicted upon a finding that he was employed in one of them only. (a)

Rule absolute.

(a) See *Shaw's case*, 2 Bl. R. 789.

PICKSTOCK *against* LYSTER. (a)

Monday,
Jan. 23d.

ASSUMPSIT for money had and received. Plea non assumpsit.

At the trial before *Richards B.* at the last *Salop assizes*, the case was this: the plaintiff being a creditor of one *Glover* in *January* 1812 sued him for his debt; *Glover* suffered judgment by default, and a writ of inquiry was executed on the 17th of *June* following, and on the 25th a fi. fa. was delivered to the defendant, the sheriff. But before that day, viz. on the 15th of the month, *Glover* being insolvent executed an assignment by deed of all his effects to trustees for the benefit of all his creditors; under which deed possession was taken immediately after its execution, but the deed was not signed by any of the creditors. This assignment *Glover* had been desirous of making, and had actually given in-

Where *G.* a debtor to plaintiff, being sued by plaintiff, pending the suit and before execution, being insolvent, executed an assignment of all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken. Held that the assignment was not fraudulent within stat. 13 *Eliz. c. 5.* although made to the intent to delay the plaintiff of his execution.

(a) Cause was shewn at Serjeants' Inn before this term.

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structions for its preparation in the early part of the year, though not until after he had been served with the writ at the plaintiff's suit, and the deed had been prepared, and in it the plaintiff was named as one of the trustees, but it did not appear that was done with his knowledge, and his name was afterwards erased, and that of another creditor substituted. The deed, as it originally stood, contained a clause whereby the trustees engaged to indemnify *Glover* from his debts; which clause was erased before its execution on the 15th of *June*; and on account of this and other erasures, it was suggested that it had better be re-ingrossed, but *Glover* refused, as much on account of the expence as for fear he should be arrested, saying that he should not be safe another day, and that the plaintiff would take possession of his goods in the mean time. The defendant levied under the *fi. fa.* but retained the proceeds in his hands, for which this action was brought, in order to try the question whether the property passed from *Glover* by this assignment and delivery of possession. The learned Judge directed the jury that if they thought the deed was executed with an intent to defeat the plaintiff of his execution, then it was void in law, and they must find for the plaintiff, but otherwise for the defendant. The jury found a verdict for the plaintiff.

Abbott obtained a rule nisi in the last term to set aside the verdict for the misdirection, insisting that it was competent to *Glover* by this assignment, which was made for the benefit of all his creditors, to divest himself of his property, although he might thereby intend to defeat the plaintiff of his execution. And he cited *Holbird v. Anderson* (a), where a warrant of at-

(a) 5 T. R. 235.

torney to confess a judgment, was given by a debtor to one of his creditors in order to defeat the pending execution of another creditor; and it was held well, and that the debtor might prefer one creditor to another, and it was compared to a judgment confessed by an executor, after another suit has been instituted by another creditor of the testator. And if the preference given in that case by the debtor in exclusion of the other creditors was good, a fortiori it shall be good in this case, where the preference given is not in exclusion of any one creditor, but for the benefit of all. Here the plaintiff might if he pleased have come in under the deed. He cited also *Meux v. Howel*. (a)

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Jervis and *Puller* who shewed cause, submitted that the question whether done with a fraudulent intent or not, was a question for the jury; and that the avoidance of the deed was a consequence of law upon their finding. They distinguished *Holbird v. Anderson*, inasmuch as the warrant of attorney there given was no more than a security given to the creditor for his debt, but not as here an assignment of all the debtor's effects to trustees of his own appointment. And Lord *Kenyon* in *Estwick v. Caillaud* (b) took the distinction, that it did not appear that that was a conveyance of the whole of the debtor's property. Here the assignment is within the very words of the preamble of stat. 13 *Eliz.* c. 5. for it was "devised to the intent to delay a creditor of his suit." And they mentioned a case before *Lawrence J.* at *Hereford*, where a creditor having obtained judgment against his debtor in the mayor's

(a) 4 *East*, 1.(b) 5 *T.R.* 424.

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court at *Hereford*, the debtor on the day on which execution was to have come in, executed a bill of sale of his effects to another bonâ fide creditor, the effects not being more than sufficient to satisfy that debt. And upon a question which of the two should be preferred, that learned Judge left it to the jury to say whether the bill of sale was not executed to the intent to defeat the creditor of his suit; and the jury being of that opinion, found in favour of the judgment creditor.

Abbott (*Dauncy* with him) was stopped by the Court.

LORD ELLENBOROUGH C. J. The only thing to raise a doubt in my mind upon the present case would be the authority of *Mr. J. Lawrence*, under whose direction it is said that a bill of sale executed to a bonâ fide creditor was held not only to have been made under circumstances which carried with them a badge of fraud, but to be evidence of such fraud as warranted him in leaving it to the jury to find against the bill of sale, if it was made in order to defeat another creditor. But I am afraid that if the conveyance in this case be not good, it will break in upon the validity of all judgments confessed by executors, or by the party himself, where either the party or the executor wishing to give a preference to some particular creditor has confessed the same; all judgments also which have been confessed for the actual aggregate amount of the debts due to all the creditors, and with their consent, will be open to this objection. Can any one doubt that the first motive in many of those cases, as well as in this, was to defeat the particular creditor; but at the same time it is not considered as an injury to him, being for the benefit
of

of all the creditors, to procure an equal distribution amongst all of the fund to which all have an equal right, against one who has gained the first step upon them. In *Tolputt v. Wells* (a), and in a note which is there given (b), and which was cited by myself, it was considered that an executor might give a preference, and make confession in favour of some creditors pending a suit by another creditor. The principle of those decisions would be destroyed, if we should hold an assignment fraudulent, because it may operate to the prejudice of a particular creditor. Such an assignment as the present is to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors. Here if the assignment had been for the purpose of fraud upon the plaintiff, the plaintiff would have been entirely excluded from it, whereas it appears that his name was once proposed and inserted as a trustee. The deed also when executed was not then taken up on the sudden and for the first time, but had been in the contemplation of the debtor for several months before. It is not the debtor who breaks in upon the rights of the parties by this assignment but the creditor who breaks in upon them by proceeding in his suit. I see no fraud, the deed was for the fair purpose of equal distribution. In the case before *Lawrence J.* I cannot help thinking that the deed must have been made in trust for the party himself; otherwise that learned judge, who could not have been ignorant of *Holbird v. Anderson*, must have

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(a) 1 M. & S. 395.

(b) *Ibid.* 408.

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felt the weight of it, unless there was some such distinction. If that were not so I cannot agree that what he ruled was according to the law. The uniform practice has been otherwise, particularly in the case of executors, which is in *pari materiâ*, and also in the case of *Holbird v. Anderson*.

LE BLANC J. Although the question went to the jury, yet certainly from the manner in which it was left to them, it appears, they were advised that if the deed was made with an intention to defeat this particular creditor, it would be fraudulent. This was not a deed by which the party stipulated for a benefit to himself, but all the property of the party is fairly to be distributed amongst his creditors, including this particular creditor. To hold such a deed fraudulent would be contrary not only to *Holbird v. Anderson*, but to all the cases which have decided that a party, independently of the bankrupt statutes, may convey away his property for the benefit of all his creditors. There is nothing here to shew any particular fraud, the deed was in contemplation a long time before; it seems to me therefore that the verdict was wrong.

BAYLEY J. It seems to me that this conveyance so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all his debts, and he proposed to distribute his property in liquidation of them: this was not acceded to, for the plaintiff endeavoured by legal process to obtain his whole debt, the obtaining of which would have swept away the property from the rest of the creditors. The debtor when he executed was not for the first time
adopting

adopting a new notion: it had been in contemplation some months before. And this creditor is not excluded by the deed, but will stand to all intents and purposes in the same situation with all the rest of the creditors.

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DAMPIER J. The case of *Holbird v. Anderson*, as it seems to me, entirely governs this case: and therefore this case was left to the jury under an erroneous impression, that if the conveyance went to defeat this plaintiff of his execution, it would be fraudulent. But the deed was not fraudulent nor any thing more than the party was entitled to make. If indeed the plaintiff could have shewn to the jury that the whole transaction was fallacious, that the trustee was in effect only a trustee for some particular creditors, and not as he is stated for all, the case would have been different; that might have given it a fraudulent complexion. But as it stands, it falls within the reason of *Holbird v. Anderson*, and the case of executors, which at this day it would be very dangerous to shake.

Rule absolute.

1815.

*Monday,
Jan, 23d.*GOMERY *against* BOND. (a)

Where the seller of goods upon the buyer's refusal to accept them requested the buyer to sell them for him, which the buyer agreed to do if he could, but did not: Held that in an action by the seller for the price, the jury, in considering whether the request made by the seller was a waiver of the contract of sale, could not take into their consideration whether such request was made under an ignorance of the law, and impression that his remedy was gone.

ASSUMPSIT for goods sold. Plea, general issue. At the trial before *Richards* B. at the last *Hereford* assizes, the evidence was, that the plaintiff's wife agreed with the defendant for the sale to him of a quantity of clover seed. When the seed was delivered the defendant disapproved of its quality, and refused to have it. The plaintiff then requested him to sell it for him, which the defendant agreed to do if he could, but after keeping it some time returned it to the plaintiff, who refused to receive it, and brought this action for the price. It was objected that the plaintiff had waived the contract by what he afterwards did. The learned Judge left two points to the jury; 1st, whether there was an agreement for sale, 2dly, if there was, whether the plaintiff had waived it by his request to the defendant to sell the seed for him. And upon that he directed them to consider, whether when the plaintiff made the request he was aware of his rights; stating that if he did it under an ignorance of the law, and impression that his remedy was gone, it would not amount to a waiver of the benefit of his agreement. The jury found a verdict for the plaintiff damages 6*l*.

Abbott moved for a new trial for the mis-direction, insisting that the rule was, *ignorantia juris non excusat*. And he put the instance of the drawer of a bill of exchange who has had no notice, promising to pay it with

(a) Cause was shewn at Serjeants' Inn before this term.

full knowledge of all the circumstances, who cannot afterwards aver that the promise was made under an ignorance of the law, in order to avoid its effect as a waiver of the want of notice. And he cited *Bilbie v. Lumley*. (a)

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Puller shewed cause, and distinguished *Bilbie v. Lumley* from this case, for there the question was, whether a party could recover back money paid under an ignorance of the law; and *Brisbane v. Dacres* (b) was to the same point; but here the question is whether a particular act amounted to a waiver, which is a question for the jury; and in determining that the jury must consider quo animo the act was done; or in other words, whether the party knew or was ignorant of his situation.

LORD ELLENBOROUGH C. J. There was not any question upon the credit of the witness, and if the witness was speaking truth, there could be no doubt but that the plaintiff had waived the contract. There could be no question upon the fact, if believed, but that the party had waived insisting on his contract, and allowed the other party to sell for him.

DAMPIER J. If the direction was incorrect, the case went to the jury under an erroneous impression.

Per Curiam,

Rule absolute.

(a) 2 East, 469.

(b) 5 Term, 143.

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Monday,
Jan. 23d.DAVIES *against* EDWARDS. (a)

Debt for rent, without shewing in what parish the lands were situate, and a particular of plaintiff's demand, describing them in a wrong parish, yet it was held, that plaintiff might recover, it not appearing that any misrepresentation was intended, or that defendant held more than one parcel of land of plaintiff so as to be misled by it.

IN debt for rent upon a demise of lands, not setting forth where the lands were situate, and nil debet pleaded, at the trial before *Richards* B. at the last *Monmouthshire* assizes, the indenture of demise between the plaintiff and defendant was proved, being a demise of lands situate at the parish of *Mynnyd-thus-loyn*, in the said county. The defendant produced a particular of the plaintiff's demand, which was for "40*l.* for two years' rent for premises at *Chepstow*." And it was insisted for the defendant that by reason of this misdescription in the bill of particulars the plaintiff could not recover. The learned Judge over-ruled the objection, being of opinion that the particular disclosed substantially the subject-matter of the action, which was the rent, and it not appearing that any misrepresentation was intended, or that the defendant held any other premises so as to be misled by it; and there was a verdict for the plaintiff, with liberty to the defendant to move.

Accordingly a rule nisi was obtained in the last term; and now the rule coming on, the Court desired to hear the counsel in support of it.

Jervis and *Peake* relied on what the Court said in *King v. Fraser* (b), at the time when they determined that the plaintiff in declaring in debt for use and occupation need not state the place where the pre-

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(b) 6 *East*, 348.

mises lie; the Court then said that "the inconvenience arising to the defendant from this general form of declaring might be obviated by the practice of calling for the particulars of the plaintiff's demand, by which the defendant may be truly informed where the lands lie." But how is the defendant to be truly informed, if the particulars may describe the lands as lying in one parish, and yet the plaintiff may recover for lands in another; or what remedy against generality is afforded by particularizing in matters which the party is not bound to abide by? It is rather calculated to mislead than to inform. Therefore the reason of the thing requires that the particular should be conclusive on the plaintiff, and the practice has been to hold parties strictly to their bill of particulars. Here if the defendant had rented lands in other parishes he might have been surprized.

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Lord ELLENBOROUGH C. J. If the defendant could have shewn not only that he might have been, but that he was actually surprized, there would have been some foundation for the argument. But here no deception whatever was practised, nor was the defendant misled; if he had gone to a judge's chambers, as it was competent to him to do, for farther particulars, and had stated that he held no other but these premises, would it not have been useless to have granted him a farther particular?

Per Curiam,

Rule discharged.

Abbott (with him *Dauncry*) was to have shewn cause.

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Jan. 23d.ISHERWOOD *against* OLDKNOW. (a)

Devise to the use of *H. I.* for life without impeachment of waste, &c. remainder to the use of plaintiff for life, with power to make leases for two or three lives, &c. or for the term of 21 years, so as there be reserved the best rent without taking any sum or sums of money or other thing for or in lieu of a fine; and *H. I.* by indenture 15th October leased for 14 years, to be computed as to the meadow land from 13th February last, the pasture from 25th March last, and the messuage from 12th May last, under a yearly rent, payable to lessor, and such other person as should be entitled to the freehold and inheritance, half yearly, on 11th November and 25th March, the first payment to be made on 11th November next ensuing, and lessee covenanted with lessor, his heirs, and assigns, for payment to lessor and such other person, &c. of the rent at the days and times, &c. Held that the lease for 14 years was warranted by the power to lease for 21; and that the reservation of the first half year's rent, payable at the end of 27 days, was not taking a sum of money for a fine, being in consideration of a preceding occupation; and that plaintiff, after the death of *H. I.*, was an assignee within stat. 31 *H. 8. c. 34.*, and might maintain covenant against the lease for rent-arrear after the death of *H. I.*, and during the continuance of the term.

COVENANT. The plaintiff declares that *Thomas Bradshaw Isherwood*, being seised in fee of the premises hereinafter mentioned to be demised, on the 22d of September 1790, by his will, duly executed and attested, devised the same, among other things, to trustees in fee upon trust for the payment of certain annuities, and, subject thereto, to the use of his brother *H. B. Isherwood* for life, without impeachment of waste; remainder to the use of the trustees to support contingent uses, &c.; remainder to the use of his first and other sons successively in tail male; and in default of such issue, to the use of his brother *John Isherwood* for life, without impeachment of waste; remainder to the use of the trustees to support, &c., with several remainders over; with power to the trustees and to his said brothers and nephew respectively, from time to time during the several terms of their lives, and as they should be actually seised, by any writing, &c. to make any lease of the devised premises, or any part thereof, &c. for the term of two or three lives, or for 99 or any other number of years, determinable on the death of two or

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three lives concurrent at the same time, or *for the term of 21 years*, in possession and not in reversion or by way of future interest, so as upon all and every such lease there were reserved payable during the continuance thereof, the best and most improved yearly rent, which at the time of making such lease could be gotten for the same, to be incident and belong to, and from time to time go along with the several uses therein-before mentioned, *without taking any sum or sums of money or other thing, for or in lieu of a fine or income for the same*, and so as there were a condition for re-entry, &c. And the plaintiff avers that the testator died, whereby *H. B. Isherwood* became seised for life with the said power of leasing, and being so seised by indenture (15th of October 1800) by virtue of the said power, and for the considerations therein mentioned, demised the premises to the defendant *for 14 years*, to be computed as to the meadow and plough lands from the 13th of *February* then last past, the pasture lands from the 25th of *March* also then last, and the messuage, &c. from the 12th of *May* then also last, under a yearly rent of 10*l.* payable to the said *H. B. Isherwood*, and to such other person as for the time being should be entitled to the freehold and inheritance, by half-yearly payments on the 11th of *November* and the 25th of *March*, *the first payment thereof to be made on the 11th of November next ensuing the date of the indenture*, &c. And the defendant covenanted with *H. B. Isherwood*, his heirs and assigns, for payment to the said *H. B. Isherwood*, and to such other person as should be entitled to the freehold, &c. of the said rent, at the said days and times, &c. and for keeping and yielding up the premises in repair, and

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not to carry any manure off the premises. And the plaintiff shews that the defendant entered and was possessed, and that *H. B. Isherwood* died without issue on the 26th of *January*, 1801, whereby he the plaintiff became seised of the reversion of the said demised premises, expectant on the determination of the said demise, for his life, and entitled to the freehold of the said demised premises; and the plaintiff assigns for breach the non-payment of two years' rent, accrued after the plaintiff became so seised, &c. and also the not keeping during the term after the plaintiff became so seised, &c. and not yielding up at the end of the term the premises in repair, and also the carrying off manure, &c. Issue being joined upon pleas to these several breaches there was a verdict for the plaintiff at the trial before the Chief Justice of *Chester*.

And in the last term it was moved by *Benyon* in arrest of judgment, first that the lease for 14 years was not a limitation of the use in compliance with the power to lease for 21 years; and therefore was good only for the life of *H. B. Isherwood*, the grantor; 2dly, that the lease was not warranted by the power, by reason that the power forbid the taking any sum of money for a fine, whereas the lease stipulates for payment of half a year's rent at the end of the first 27 days, which is in effect taking a sum of money for a fine; 3dly, that this action would not lie for the remainder-man, either at the common law; or by stat. 32 *H. 8. c. 34.* he not being an assignee within that statute.

Littledale, Lyon, and D. F. Jones, shewed cause; and upon the first point they referred to stat. 32 *H. 8. c. 28.* concerning leases by ecclesiastical persons, &c. and the

two restraining statutes of 1 *Eliz.* and 13 *Eliz. c. 10.*, where the words of the exception out of the restraint are, *other than for the term of 21 years or three lives, without saying or under.* And yet a lease for a lesser term, or fewer lives, is good (a). So here the words of this power, being *for the term of two or three lives, &c. or for the term of 21 years*, although it doth not say *or under*, the lease may be for a lesser term. And *Carter and Claycole's case* (b), which was a lease by the warden and fellows of *All-souls College* for *twenty* years, is conclusive in favour of this lease. To the second objection they answered, that though the lease stipulates for payment of half a year's rent at the end of 27 days, yet it appears by the lease that such reservation was for an antecedent occupation of the several parts of the lands demised. Upon the third objection they cited several authorities, that by the common law, and before the stat. 32 *H. 8. c. 34.* the plaintiff might have had this action; for the covenant is to do a thing annexed to the land, and the remedy by covenant doth run with the land; as if an abbot covenant to sing for *B.* and all the lords of such a manor, in his chapel there, the assignee of the manor shall have covenant (c). But without insisting farther upon this, they went on to the main argument, viz. that the plaintiff was an assignee of the reversion within the stat. 32 *H. 8.* Although the statute speaks of grantees and assignees of the reversion, yet an assignee of part of the estate of the reversion may take advantage of the covenant (d). As in

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(a) *Co. Lit.* 44. b. ; 5 *Rep.* 6. b.(b) 1 *Leon.* 306.(c) 5 *Rep.* 17. b. *Co. Lit.* 385. a. *Bro. Abr. Covenant.* 5. 2 *Bulst.* 282. per *Coke C. J.* 1 *Rol. Abr.* 521. pl. 6.(d) *Co. Litt.* 215. a. *Attoc v. Hemmings*, 2 *Bulst.* 281.

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the case at bar, the plaintiff is assignee of the reversion for life. For the statute, which is a remedial law, has been construed liberally, and therefore every one who comes in by the act and limitation of the party, though in the *post*, is a sufficient grantee within it (a). So the surrenderee of the reversion of copyhold lands, though formerly held not to be within the statute, because he was in by custom only, and not privy to the lease made by the copyholder, nor in by him (b), has since been held to be within the intention and equity of the statute (c). Now here, according to *Whitlock's* case (d), and *Machel v. Duntton* (e), the plaintiff is in by the devisor of part of the estate of the reversion which the devisor had, after the term of years expired; for the lease, after it was made, came in by virtue of the power above all the limitations, and took its essence, not out of the estate for life, but out of the estate of the devisor before all the other estates; and then the plaintiff coming in after, in nature of a reversioner, the reservation of the rent to him is good. And it seems, according to *Holley v. Scott* (f), recognized by *Ashurst J.* in *Doug.* 572., under the name of Sir *J. Astley's* lease, that a reservation to the tenant for life, his heirs, and assigns, without more, would have been a good reservation to give the remainder-man the benefit of this covenant, for the words heirs and assigns must mean the person, to whom the inheritance shall go, and can have no other meaning. And so it was considered in *Whitlock's* case. And in *Sands v. Ledger* (g), *Holt C.J.* never doubted but that the remainder-man might have

(a) *Co. Lit.* 215. b. *Moor*, 98.

(b) *Brasier v. Beale*, *Telv.* 222. *S. C. Cro.* 7. 305.

(c) *Glover v. Cope*, *Carth.* 205. *S. C. 4 Mod.* 80. (d) 8 *Rep.* 79.

(e) 2 *Leon.* 33. (f) *Loffi's Rep.* 316. (g) 2 *Ld. Raym.* 792.

debt for rent reserved upon a lease made by tenant for life under a power.

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Benyon, Holroyd, and Richardson, contra, upon the first point argued, that powers of this sort were to be expounded strictly. And as to the decisions upon leases by ecclesiastical persons, under the statutes, they said that they are founded upon the particular words and intention of the statutes upon which they severally arose, and do not apply to this subject. The statute 32 H. 8. c. 28. expressly enables the granting of *any* lease not above 21 years; and the mischief aimed at by the restraining statutes was the decay of livings and impoverishing of successors by the making of long leases; and in order to prevent the making of long leases, the statutes made all leases other than for 21 years, &c. void; it is evident therefore that they prescribed 21 years as the maximum, and that to construe them by the strict letter as making 21 years the shortest period, would have been to defeat their object. But powers are like conditions precedent, and must be construed and complied with strictly^(a); as if power be given to three persons to sell, and one of them die, the survivors cannot execute it. So if power be given by letter of attorney to *A.* to make a lease for 21 years, *A.* cannot make a lease for 14 years. And if this lease does not emanate from the tenant for life, but only from the framer of the power, the tenant for life is no more than attorney to him for the making it. Also the rule laid down in *Whitlock's case* ^(b), which has been agreed to, and acted upon in subsequent cases ^(c), is, that all

(a) Per *Asbburst J.* 1 T. R. 709.

(b) 3 Rep. 70.

(c) *Rattle v. Popham*, 2 Str. 992. *Roe v. Prideaux*, 10 East, 186.

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positive particular powers, must, in all material circumstances, be positively and particularly pursued; and a difference was taken between a particular power affirmative, and a general power restrained with a negative, upon which difference the lease in that case was adjudged a good lease, pursuant to the power, because the power was general, and the restraint came after. And upon the same distinction the power in the case at bar is not well pursued, because the power has particularized the species of lease, namely, a lease for 21 years, and the lease is not for 21, but for 14. The intent of the testator who gave the power might have been to prevent the estate from being leased for a shorter term, he might think a shorter term prejudicial to the estate, or he might act capriciously. Secondly, the reservation of the first half-year's rent, was a reservation by way of fine or foregift; for although the habendum is from an antecedent date, the lessee's prior enjoyment is not referable to the lease, and he took nothing under the lease before the day when it was executed. Therefore here is a reservation of half a year's rent for an enjoyment under the lease of only 27 days, and the lessor, if he had lived but 27 days, would have been entitled to half a year's rent, whereas it ought to have been so reserved that if he did not live the half year it should go to the reversioner. Therefore it is equivalent to the lessor's taking a sum of money by way of fine. Upon the third point they urged that no authority or precedent for this action is to be found in any book of entries or reports. As to its being maintainable at the common law, although some dicta may be found, which favour the opinion that the assignee of the reversion could maintain covenant at the common law, the better opinion

opinion is the other way; *Thursby v. Plant* (a), *Bar-ker v. Damer* (b), *Thrale v. Cornwall* (c); and of that opinion was Lord *Kenyon* in *Webb v. Russel* (d), and the recital in the statute 32 H. 8. would be unfounded if it were otherwise. Also in *Co. Lit.* 215. b. it is said, "that at the common law neither assigns in deed nor assigns in law could have taken the benefit of either entry or re-entry by force of a condition;" *Shep. Touch.* 149. is to the same effect; and covenants stand upon the same footing with conditions. Then if this action be maintainable, it must be by force of the stat. 32 H. 8. Now the plaintiff in order to come within the statute must be a grantee or assignee to or by the lessor or grantor himself; that is, he must be in by virtue of the grant or assignment of the person who made the lease, and to whom the covenants were made. That person was in fact the tenant for life. Is then the plaintiff grantee or assignee to the tenant for life? It is not pretended that he is; but it is said he is so to the devisor, and that the lease derived its essence out of the estate of the devisor, and not out of the estate of the tenant for life. Still, however, the tenant for life was the covenantee, and it was settled in *Webb v. Russel* (e) that a reversioner, in order to maintain an action under the statute, must be in of the reversion by the covenantee. So *Moor* 876. the statute does not extend to him in reversion, who is in of another estate. But in answer to this a legal fiction is resorted to, and it is said that in the eye of the law the devisor, by whom the plaintiff is in of the reversion, was the person who made the lease, and to whom the covenants were made, That the lease derived its efficacy from the devisor

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(a) 1 *Saund.* 237.(b) 3 *Mod.* 338.(c) 1 *W'ils.* 165.(d) 3 *T. R.* 401.(e) 3 *T. R.* 393.

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may be admitted, but it is carrying the fiction a step farther to say that he was the covenantee; and can it be maintained that the heirs of the devisor would, as privies in blood, be liable to an action of covenant by the lessee or his assigns? *Machel v. Duntun* is different from this case, because there the devisor devised the lands to one for years, and by the same will devised the reversion to another; so that in that case the devisee of the reversion was strictly the assignee of the person who created the term, and there was no intermediate lessor to whom the covenants were made. And *Glover v. Cope* (a) only decided that the surrenderee of copyhold is in by the copyholder, though he takes from the lord, because the lord is a mere channel to convey; but it left the principle untouched, viz. that he must be privy to the lease made by the copyholder, and in by him, in order to be a grantee, &c. within the act. *Sands v. Ledger* does not apply because that was an action of debt, which lay at common law upon the privity of estate, and not upon the privity of contract. Then as to *Holley v. Scott* it is observable that the only question there was, whether the condition for re-entry ought not to have been expressed, in words, to be reserved to the inheritance, instead of *to the heirs and assigns* of the tenant for life, and the Court held that a reservation by those words was the same as if it had been expressly reserved to the persons in remainder or reversion. But it never was agitated, nor could it be, whether under the reservation the remainder-man would by the statute have the benefit of the condition, or could bring an action upon the covenant. The most that can be made of it is, that the Court, without adverting to the distinction,

(a) *Carib.* 205.

took it for granted that covenant would lie; which was likely enough to be the *primâ facie* impression. The holding that this action is not maintainable will not deprive the remainder-man of his remedy, it will only alter the form of it; if these be not covenants which run with the land, they are covenants in gross; only the re-entry will be lost to the remainder-man.

Sugden, Amic. Cur. mentioned *Davis's* case from *Woodfall's Landlord and Tenant*, 434., 4th ed., and said, that if upon enquiry the lease in that case should turn out to be a lease made under the power, it would be expressly to the point in question.

LORD ELLENBOROUGH C. J. This was a motion in arrest of judgment in an action of covenant, in which the plaintiff declared and assigned for breach (among others) the non-payment of rent. The action is brought by the remainder-man upon a lease granted by the first tenant for life, under a rent reserved to the lessor, and to such other person as for the time being should be entitled to the freehold or inheritance; and the lessee covenanted with the lessor, his heirs and assigns, to pay such rent. And the question is, whether the plaintiff shall take advantage of this covenant, or is an assign within the meaning of this lease, as it stands upon the law on this subject, and upon the *stat. 32 H. 8. c. 34.* The power is stated on the face of the declaration, so that it appears to the Court that this lease was made by the tenant for life as in execution of his power. The power is to the devisees respectively, as they should be actually seised of the premises, by any writing, &c. to make any lease of the devised premises, or any part thereof, as had been

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usually leased, &c. to any person for two or three lives, or for 99 or any other number of years determinable on the death of two or three lives, or for the term of 21 years in possession, &c. The first objection made is, that the lease is not warranted by the power, because it is granted for 14 years only. Now if we look to the object of this power we cannot but see, that it certainly was made with a view of limiting the extent of the benefit which the tenant for life should take in the granting of leases, and to place the time that he should be at liberty to exercise a dominion over the estate under certain guards and restrictions as to its duration. Therefore the power says he shall have for the term of 21 years; that is the greatest period allowed him; and does not that necessarily include a power to lease for a less time? It gives him the whole term; and it is among first principles that every man who has power over the whole may renounce a part, if it be given for his benefit. And I cannot conceive that it is not a renunciation in part of his benefit, to grant for 7, 10, 12, or 14, or any number of years short of the whole exhaustion of the 21. This is a grant for 14 years; and I think it is within the rule, *omne majus continet in se minus*; in like manner as if there be a licence or authority to a man to do any number of acts for his own benefit, he may do some of them and need not do all. So here, the tenant for life might exercise his right to the utmost extent of the power, or he might stop short of that; and then every part of which he abridged himself would be for the benefit of the next in remainder; he would throw back into the inheritance that portion which he did not choose to absorb for his own use. The second objection

jection arises on that part of the power respecting the fine. The power makes a condition, that upon every lease there should be reserved, payable during the continuance thereof, the best and most improved yearly rent, &c. without taking any sum or sums of money or other thing for or in lieu of a fine or income for the same. Now it appears that this lease was granted on the 15th of *October*, and that by the stipulation of the parties payment of half a year's rent became due on the 11th of *November* following; that is, 27 days after granting the lease a compensation, as it is said, for the granting it, has been stipulated for. But how is that a breach of the condition? Is it taking a sum or sums of money for or in lieu of a fine? It is at the utmost but granting a lease with a covenant for payment of the first half-year's rent before the half year has expired. It is, therefore, at the utmost only taking a covenant which may be the means of possibly acquiring to him a sum of money. Then it is not within the letter. But is it within the spirit? The power says, "for or in lieu of a fine or income for the same;" is this for or in lieu of a fine or income? What fine did the party contemplate? The reservation appears to be in consideration of an antecedent occupation; it is not in lieu of a fine if a party take a compensation for a time antecedent to the date of the lease, during which time the lessee has been permitted to occupy, and considering the lease as if it were executed at the time of the commencement of the occupation. If it had been alleged in pleading, that this was a taking of the rent contrary to the power, might it not have been replied, that the rent was taken merely to compensate the lessor for an antecedent occupation? This could not in any shape deprive the remainder-man of any portion of his interest,

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terest. We come then to the third and main question, and the only important question, which has occupied the greatest portion of the argument. That question is, whether the plaintiff, as assignee, either at the common law or under the stat. 32 *H. 8.*, is entitled to maintain this action. I will not stay to consider whether he is so at the common law, although, without meaning to pronounce on that, I rather incline to think he is not; because, if he were, the provision of the statute *H. 8.* would have been in a great degree unnecessary. The statute recites, "that many temporal and religious persons had made leases, &c. to divers persons, &c. for term of years, &c., containing conditions and covenants, &c. and that by the common law no stranger to any covenant or condition should take any advantage or benefit of the same, but only such as are parties or privies thereto;" and then it recognizes, as a consequence, the situation of all grantees of reversions, as also of all grantees and patentees of the crown of lands late belonging to monasteries dissolved, or by other means come to the hands of the crown, that they were excluded to have any entry or action against the said lessees, their executors, or assigns, which the lessors before that time might have had against them, for the breach of any condition or covenant in their said leases; and the statute proceeds to enact "that they shall have the same advantage and remedies by action, for not performing of covenants contained in their leases, against their said lessees, as the lessors themselves or their heirs might have had, in the like manner as if they were not strangers." The object of the statute, therefore, was the benefit of that class of persons who are recited in it.

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The statute comprehended a mass of property before then recently come to the hands of the crown in various ways by the dissolution of monasteries, &c., and granted out by the crown to a most considerable class of persons. All those persons found themselves by the common law stripped of the immediate advantages which the original grantors themselves enjoyed, except by action of debt or by distress. For remedy of this inconvenience the statute makes them privies to the covenants made with the original grantors. This was done at the time for the benefit of the grantees of the crown, which was the principal object of the statute, but the remedies were also extended to other grantees. Thus we find that the statute provides "not only that all grantees of the crown, but that all grantees to or by any other person, may have the like advantages against the lessors, by entry, &c., and also by action, &c., as the lessors or grantors themselves." It appears then that persons not strictly privies to the covenant, and before this statute not entitled to maintain an action upon the covenant, may now maintain their action; the statute having transferred the privity of contract. And such has been the persuasion which has pervaded the whole profession ever since the passing of the statute. It has, however, to-day been drawn into doubt in this particular case, and with great curiosity of research made the subject of argument. But we find the impression which pervaded the mind of Lord Coke, in *Whitlock's case*, as appears by the last resolution in that case, was that the lease had not its essence from the estate of the lessor, which he had for life, but out of the *fine*, from which the lessor's estate was derived, and "that in construction of law it preceded the estate for life,

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life, and all the remainders; for after the lease made, it is as much as if the use had been limited originally to the lessee for the term, and then the other limitations in construction of law follow it." "Then," he adds, "when the lessor reserves rent to him and his heirs, it is good, for that by construction of law precedes the limitation of the uses; and then it being well reserved, it is well transferred to every one to whom any use is limited." He considered, therefore, the reservation in that case as the creature of the power, and transferred with the subsequent limitations. He considered it as virtually made by the person out of whose estate the power was first created, and that virtually the assignment came from him; that it was not strictly an assignment from the person who signed the lease, but from the person out of whose estate the lease was to have its essence and operation. In this light it seems to have been considered soon after the statute 32 H. 8., which was about six years after the passing of the statute of uses, when powers grew up and by degrees became an usual instrument in family settlements. That it was so understood very early appears from *Machel and Dunton's case* in *Leonard*, where the lessor devised to his lessee an elongation of his term, yielding the rent, and under such covenants as in the first lease, and devised the reversion to another; and admitting the words of the devise to be a condition, the doubt was if the devisee in reversion was grantee within the statute, because it was never in the devisor a reversion or condition; and the whole Court was of opinion that he was, and should take advantage of the condition. It has been sometimes said, *communis error facit jus*; but I say *communis opinio* is evidence of

of what the law is; not where it is an opinion merely speculative and theoretical floating in the minds of persons, but where it has been made the ground-work and substratum of practice upon which powers of this sort have been erected and acted upon from the time of 32 H. 8. down to the present time; all of which have been framed under the supposition that the various covenants which the author of the power prescribed were capable of being enforced. For what purpose can we suppose that persons conversant in drawing wills and family settlements have gone on prescribing these terms, where no one term and no one covenant, except that for payment of rent, could be enforced. As to the covenants for repairs, and for the management of the estate, and every thing collateral to the payment of rent, all these would be nullities as far as the action of covenant is concerned; and nothing would remain except the remedy by distress or debt for the rent. Can we imagine that these learned persons should, for so long a series of years, treat nullities as realities and as having vital operation? And yet all this we are desired to adopt. That which is stated by *Ashhurst J.* in *Dougl.*, upon mentioning the case of *Sir John Astley's leases*, is evidently stated by him as fortifying the position which he adopts, that the remainder-man should have the benefit of covenants upon a lease made with the tenant for life, although the covenants were only with the lessor, his heirs and assigns. In that he is supposed to have been referring to the case in *Lofft*, from which I profess myself at present, not having the case before me, able to collect but little; however, we find in *Dougl.* the learned Judge, in the presence of *Lord Mansfield* and *Buller J.* stating the position as
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one which had been recently decided; and that position accords with the universally received opinion. It is too much, therefore, for us at this time of day to pronounce that all which has hitherto been esteemed and done as valid has been error; particularly when we have the text of Lord *Coke* in *Whitlock's* case to the same effect. No question was made at the time upon the propriety of those decisions, or of the prolatum of law which we find in them. I do not impute blame to the learned persons who have agitated this question, either upon any persuasion of their own minds, or as being a question somewhat perhaps incumbered by the refined nature of the argument. Whatever doubts there may have been, they are entitled to respect; without, however, overturning that which the habit, the practice and persuasion of mankind have considered as settled, I think we cannot give effect to them. It seems to me that they are not supported by legal reasoning, and that if we were to adopt them, we should do so without any foundation; and therefore I think the judgment in this case ought not to be arrested.

LE BLANC J. This comes before the Court upon a motion in arrest of judgment in an action by the second remainder-man, charging the lessee under a lease granted by the tenant for life, at the end of the lease, with breaches of covenant for non-payment of rent, for not yielding up the premises in repair, and for carrying off manure; on which breaches there was a verdict for the plaintiff with 80*l.* damages. The objections which are raised are in arrest of judgment. Of course the defendant will be entitled to the benefit of all that which the law has established in his favour;
but

but of course also the Court will not be disposed to attend to any arguments which are not strictly established in point of law. The objections are three: first, That the lease granted was such as the grantor had no authority by the power to grant; and if that be so, of course the plaintiff cannot maintain this action. The objection is, that the power given is to make any lease for the term of 21 years, and that this is a lease for 14 years only. In construing this power the Court are to look at the language which the party creating the power has used with reference to the situation in which he stood. The devisor has carved out his estate, giving it first to one brother for his life, remainder to his children in tail, remainder to another brother for life, and to his children; and power is given to them from time to time as they should be actually seised to make leases to a certain extent, in order that by preventing them from going beyond that limit, such leases should not prejudice the interests of the persons in remainder. Therefore we find that power is given to lease for the term of two or three lives, or for 99 or any other number of years, determinable on the death of two or three lives, or for the term of 21 years, in possession and not in reversion. We are now called upon to construe what the devisor intended by "for the term of 21 years in possession and not in reversion." He is evidently speaking of a power which he was framing so as not to injure the persons in remainder. And is not then this limitation as to the number of years the same as if he had said, "so as the lease shall not exceed 21 years to the prejudice of the remainder-man." The arguments to shew that a lease for 14 years is not within a power to lease for 21, have been drawn from

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from cases where the Courts have determined that a lease, which might not perhaps in point of duration exceed the time limited by the power, was yet not within the power, because it altered the nature of the lease permitted by the power. Therefore if there be a power to grant a freehold-interest, and the grant be of a chattel, it is not within the power. I will admit that this power is to bear a different construction from that which is put on ecclesiastical leases; that the one is to be construed strictly and the other liberally. Yet even under the most strict construction of this power it is impossible, I think, to say that a lease for 14 years is not within a power to lease for 21. It is impossible to pronounce that the deviser intended exactly that number of years, neither more nor less, and we must look to the intent of the deviser in the making it. The next objection is, That as the lease is to be granted without taking any sum of money, or other thing, for or in lieu of a fine, the prohibition from taking any sum for or in lieu of a fine has been disregarded, inasmuch as the lessor has in effect taken something by way of fine or foregift. And that is attempted to be shewn in this way. The lease is granted on the 15th of *October*, habendum as to the meadow and plough-land from the 13th of *February* preceeding, and as to the pasture-land from the 25th of *March*, and as to the messuage, &c. from the 12th of *May*, reserving a rent payable half-yearly on the 11th of *November* and the 25th of *March*, and the first payment to be made on the 11th of *November* then next. It is therefore argued that the lease being so dated, and the rent so reserved, it follows that the lessee would have had an enjoyment but for a period of something less than a month before

half

half a year's rent would become payable; and therefore the sum payable as for the first half year operates by way of premium or foregift. This objection arises on the face of the record, and is therefore to be confined to what appears on the face of the record. True it is, that the lessee in strictness would only have had an enjoyment under the lease for a month, but it appears that the term was to commence as to different parts of the farm from antecedent periods. If the lease had stated that the first half year's payment was to be made in consideration of an occupation from those periods, not indeed under this lease, but under some other agreement, in that case the rent reserved could never have been considered as a reservation by way of premium or foregift. If this objection should prevail, then, upon every lease granted at a rent payable half yearly, which is dated on a given day, from which less than half a year to the first day of payment has to run, it might be argued, that the reservation of the first half year's rent would be *pro tanto* a foregift. The last objection has been more pressed, and it is this, that the plaintiff (the remainder-man) cannot maintain covenant upon this lease, nor could he re-enter for default of payment of the rent. The objection is founded on this, that the remainder-man is not an assignee of the reversion of the lessor so as to be entitled to maintain covenant. It is not necessary to determine whether an assignee could maintain covenant at the common law; because there is no doubt he may maintain it under the stat. 32 *H. 8.* Then the question is, is the plaintiff an assignee? He is the person next in remainder to the person granting the lease; true, he is not assignee of the lessor, he is assignee of the devisor.

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But I take it to be clear that the lease must be considered as emanating from the person who creates the power, and that it derives its force and authority from him. And this plaintiff comes in as second tenant for life under the will of the person who created the power; therefore he stands in the relation of assignee to him. The argument is, that he cannot have this action, because he must be the assignee of the person of the lessor or grantor. But he is the assignee of the person who, in the eye of the law, is the lessor, because the person empowering the tenant for life to grant the lease is, in the eye of the law, the lessor. One argument against this mode of considering it has been, that the lessee could not maintain covenant against the heirs of the devisor. But I do not think that it is necessary that all the remedies should be mutual as between the assignee of the lessor and the lessee; because mutuality was not so much an object of the statute as it was to give those persons, who at the common law were strangers, a power to enforce covenants which they had not before. The doctrine of Lord Coke in *Whitlock's* case entitles the Court to say upon principle, that this plaintiff was the assignee of him who, in contemplation of law, was the lessor; and that as such he is entitled to this action. If the question had been less clear, I should have wished for a further opportunity of looking into the case cited from *Lofft*, and that cited to us by Mr. *Sugden*: but I do not think that a question of this description will warrant us in deferring our judgment; because without those authorities I think there is sufficient to justify us in giving judgment for the plaintiff.

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BAYLEY J. This case comes singularly enough before the Court. It is not brought forward in the shape of objections moving from the remainder-man in avoidance of the lease, but as moving from the party who has occupied under it, and who sets up the right of a third person. It seems to me, however, that the lease is not invalid for any of these objections, and that the plaintiff is entitled to his action. The first objection is, that the lease is for a shorter term than is authorized by the power; that under a power authorizing to grant for 21 years the party cannot grant for less. If there were any thing to shew that the intention of the person creating the power was that the term should continue for 21 years, of course we should be bound by it. But when we consider the reason of such a limitation, it seems to me that the intention of the person who created the power must have been only to limit the exercise of it within a certain term, beyond which it should not pass. The tenant for life is authorized to impose burthens on the inheritance by leasing to a certain extent, and the longer the lease the greater will be the burthen. Let us look and see if there be any probable benefit to be derived to the reversioner from a longer lease. I do not find from the arguments of the learned counsel, who have discussed this case with great talent, that it is pretended that any advantages would be likely to result to the reversioner from the term being prolonged to the full extent of the power. Then upon the simple reason of the thing, one should say, that it is certainly more beneficial to the reversioner that he should have his estate unincumbered at an earlier period than at a later. And there is one circumstance to shew that the testator could not have intended

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that the lease in all events should endure for the period of 21 years, because he has directed that it may be limited for the term of two or three lives. It is impossible, therefore, to say that it was intended that the lease in all events should be for not less than 21 years. The cases upon the statutes of *Elix.* seem to me to bear upon this part of the case. As to the second objection, that the reservation of the first half-year's rent was made by way of premium or foregift, I do not think that as it stands on the pleadings, the first half-year's rent must be considered as payable for 27 days' occupation, but for half a year's by-gone occupation. If the reservation had been colourable and in fraud of the power, I should have thought it might have been considered as a premium; but we cannot presume fraud. It was competent to the defendant to shew that he had no enjoyment prior to the 15th of *October*, when the lease was granted. But he has not asserted that fact, and we are not warranted in going out of the record to presume it; if he had asserted it, I cannot help thinking the answer would have been that he had a prior occupation. Upon the third point it seems to me that the stat. 32 *H. 8.* extends to this case, and that the plaintiff is within the meaning of the statute an assignee of the reversion of that estate out of which this lease was granted. I agree that he is not an assignee of the tenant for life, the hand which executed the lease; but he is an assignee of the estate, out of which the lease proceeded. *Whitlock's* case is an authority to shew that it is out of the estate of the person who creates the power, that the lease, when made by virtue of the power, proceeds. It is apparent as far as respects livery, that if it were to come from the tenant for

life only it would entirely cease at his death. And there are cases which have a tendency to shew that even in the lifetime of the tenant for life it is operating as out of the estate of the person creating the power. As where one makes a feoffment to the use of himself for life, with power to make leases for lives, and he makes a lease with livery, it was at one time held to be a forfeiture of his estate for life; because he, being only tenant for life, cannot out of that estate make such leases; and when he takes on him to make livery, he takes on him to make a lease as owner of an estate sufficient for that purpose, which he is not (a). And though that has been over-ruled, it was upon this ground, that such a lease takes effect by sealing and delivery, and so the livery comes too late to do harm (b). This shews that a lease to be made by tenant for life by virtue of such a power entirely originates and takes its essence out of the estate from which the power is derived, and enures as a limitation of the use in pursuance of it. If this be so, then it will follow that the covenants made with the lessee are to pass to every person to whom the person creating the power has afterwards given any interest. They pass to the first tenant for life, then to the second tenant for life; and the reason is, because he has an interest derived not from the first tenant for life, but from the person creating the power. And such has been the invariable impression on the minds of the profession from all time until the present. If it were otherwise, to what an extent would it lead? It would lead to this, that every guard in the instrument creating the power providing

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(a) See *Moor*, 514.(b) See 1 *Pentr.* 29 . 2 *Lev.* 149. 3 *Kch.* 512.

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for particular covenants would to a considerable extent be useless, inasmuch as these covenants would be invariably nullities as far as they respected the person to whom the estate might afterwards go. It is said that the covenants would be covenants in gross, and so might be enforced, by the representatives of the tenant for life; but that would be throwing a great difficulty in the way of the remainder-man. We ought not to come to a conclusion which leads to such a consequence, unless compelled to do it. There would be many cases in which a court of equity must be resorted to. Suppose, for instance, the tenant for life dies intestate, and no one chooses to take out administration; there would be no one through whom the succeeding remainder-man could enforce the covenants, without the interference of a court of equity. Again, suppose the tenant for life makes the lessee his executor, is the remainder-man to be driven into a court of equity in order to have an issue of quantum damnificatus? Therefore I feel no difficulty in agreeing with my brethren that these covenants run with the estate out of which the lease issues, and consequently will pass to every person in succession to whom the estate is given by the person creating the power.

Rule discharged. (a)

(a) *Dampier J.* was absent from Serjeants' Inn.

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DOE, on the Demise of THOMPSON, *against*
PITCHER and Others. (a)

Monday,
Jan. 23d.

EJECTMENT for a meeting-house, burial-ground, and farm called the *Meeting-house Farm*, in the parish of *Rickmansworth*. At the trial before *Thomson C. B.* at the *Hertfordshire* assizes, there was a verdict for the plaintiff for the meeting-house and burial-ground, and for the defendants for the farm; and upon a rule nisi for entering the verdict generally for the plaintiff, or for a new trial, the Court, upon the shewing cause, directed a case to be stated for their opinion, the substance of which is this:

Jane Wilson being seised in fee of the premises claimed in the declaration, by lease and release, (dated the 4th and 5th *December* 1789,) reciting that the meeting-house and burial-ground, parcel, &c. had before and then were held by a society of *Quakers* under a yearly rent of 2*l.* 10*s.*, and that the burial-vault and tomb over it standing on the burial-ground, had before then been used as a burial-vault for the family of the relessor, &c. she conveyed all that messuage or farm called the *Meeting-house Farm*, with the several fields thereto belonging, and also the meeting-house and burial-ground, and burial-vault and tomb standing upon the said fields, or one of them, to *Mavor and Smith*, and their heirs, to the uses and upon the trusts following, viz. as to the meeting-house and burial-ground, with the appurtenants, (except the vault and tomb, &c.) to the use of the trustees, their heirs and

A grant by deed executed and inrolled pursuant to the statute of mortmain of lands to trustees and their heirs, to the use of one of them, his heirs and assigns, upon condition that he, his heirs and assigns, should, from time to time, repair a vault and tomb, standing upon part of the lands, and if need be rebuild it, and permit the same to be used as a family vault for the grantor and any of her family, and in default thereof, then over to the other trustee, his heirs and assigns, was held not to be within the words of the statute, which prohibit the granting of lands, &c. to charitable uses unless the deed be without any condition or reservation for the benefit of the grantor, or any person claiming under him.

(a) Cause was shewn at Serjeants' Inn before this term.

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assigns (a), so long as the same should be used by the society of *Quakers*, and they should pay to the trustees the yearly rent of 2*l.* 10*s.*, and keep the same in repair, and from and after the determination of that estate as to the meeting-house and burial-ground, and from and immediately after the execution of the said conveyance as to all other the premises, and also as to the rent of 2*l.* 10*s.*, during the continuance of the limitation aforesaid, to the use of and in trust for *Mavor*, his heirs, and assigns, upon condition that he, his heirs, and assigns, should, from time to time, and at all times thereafter, repair, and keep in repair, the vault, and tomb, and brick-work, and fences thereto belonging, and if need be rebuild the vault and tomb, and permit the same to be used as a family-vault for the said *Jane* and any of her family who might desire to be interred therein, and in default thereof his estate to determine, and from and after the determination of that estate to *Smith*, his heirs, and assigns for ever. And there was a power to *Smith* to enter from time to time and see the condition performed; and to the *Quakers* to build a new meeting-house upon a different site, and declaring that then the new site should be subject to the same uses and conditions as the old, and the old site subject to the same uses and conditions as the farm, &c. The indenture was executed and inrolled in the form and within the time prescribed by the statute 9 G. 2. c. 36. The lessor of the plaintiff claims under the will of *Jane Wilson*, who in 1809, by her will, devised to him in fee all her freehold and leasehold property in *Rickmansworth* or elsewhere, and died in 1810, having to the time of her death received the several rents of the *Meeting-house Farm*, and the

(a) There seems to be an omission here of "in trust for the society of *Quakers*."

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meeting-house, and burial-ground. The defendants are the assignees of *Mavor*, who since her death has become bankrupt.

The question for the opinion of the Court is, whether the condition as to the vault and tomb is within the 9th Geo. 2. c. 36.; and the said grant of the *Meeting-house Farm* is therefore void. If the Court should be of opinion that the said grant of the farm is void, a verdict is to be entered for the plaintiff for all the premises mentioned in the indenture: but if not, then the verdict to stand.

Bowen for the plaintiff contended, that the condition was for a charitable use within the statute, and that being reserved for the benefit of *J. W.* and her family, the grant was therefore void. As to its being a charitable use, Lord *Coke* in 3 *Inst.* 202. says, that the building of tombs, &c. is the last work of charity that can be done for the deceased. And *Durour v. Motteux* (a) shews that a devise of money to be laid out in land to such a purpose as the present is within the statute, notwithstanding some part of the devise may be such as, but for the particular purpose for which it was given, would not be a charitable use. Also the condition being reserved for the benefit of *J. W.* and her family, the grant is void, because the statute requires that it shall be without any reservation, trust, condition, or limitation for the benefit of the donor, or persons claiming under him; otherwise the statute declares it to be absolutely void. It is also bad on this account, because there is a limitation to *Smith* in case of non-performance of the condition, and *Smith* is a person claiming under the donor. And in *Adams and Lambert's* case (b), it was resolved that a partial limit-

(a) 1 Ves. 321.

(b) 4 Rep. 106. b.

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ation of an estate to superstitious uses was within the purview of the statute against superstitious uses^(a). Also this grant is void, because it did not take effect in possession, for it appears that *J. W.*, up to the time of her death continued to receive the rents and profits, but the statute requires that it should be made to take effect in possession for the charitable use intended, immediately from the making of it.

Lord ELLENBOROUGH C. J. The question reserved is upon the statute of mortmain, whether this grant of the *Meeting-house Farm* is void, which is granted as ancillary to a trust for keeping up a tomb. It does appear, I think, to be a charitable use in part, and in part not. As far as concerns the grantor's own interment it is not, but inasmuch as it is for her family, it may be so considered; but then the statute has been complied with. It is said, however, that here is a reservation of some collateral benefit to the donor or person claiming under the donor; but I cannot find that; all that is reserved is in furtherance and execution of the trust. The object of the statute was to prevent a reservation, under colour of a charitable use, of some substantial benefit to the donor himself. The whole object of this use was keeping up a tomb for herself and family. As to the objection that this deed did not take effect in possession, the statute only requires that it should be made to take effect in possession, and it is so made. If there were any secret reservation or trust, which was to be evidenced by her remaining in the possession of the rents for about 19 years, should not

(a) 1 Ed. 6. c. 14.

that

that have been more properly made a question before the jury? We can only look at the instrument itself, and cannot draw any such inference.

Judgment for the Defendants. (a)

Roberts was to have argued for the defendants.

(a) *Dampier J.* was absent from Serjeants' Inn.

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ACKERLEY against PARKINSON and Another. (a)

Monday,
Jan. 23d.

CASE against *Parkinson*, as vicar-general of the Bishop of *Chester*, and *Marwdesley*, as surrogate of *Parkinson*, for excommunicating the plaintiff with the greater excommunication. The plaintiff declares that a suit was commenced in the consistorial and episcopal court of the said bishop, before *Parkinson*, as vicar-general, and his surrogate, at the instance of one *Oldham* and one *Wilbraham*, who pretending to have interest in the goods, chattels, and credits of one *D. Ackerley*, deceased, prayed that the plaintiff might be cited to appear in the said court, there to take upon him administration of the goods, chattels, and credits of the said *D. Ackerley*, and also to exhibit a true and perfect inventory of the same, which had come to the hands, possession, or knowledge of the plaintiff, and also to render a true and just account of his administration thereof; whereas in truth the plaintiff was not bound by law to do any or either of those acts, nor had the said court any power by law to compel him so to do, nor any jurisdiction whatever over such pretended suit;

An action upon the case was held not to lie against the vicar-general of the bishop for excommunicating plaintiff with the greater excommunication, for contumacy in not taking upon him administration of an intestate's effects, to whom plaintiff was next of kin, and had intermeddled with the goods, &c. although the citation by which plaintiff was cited was void, by reason that it required him to appear and take administration, &c. without leaving him an option to renounce it, and the proceedings thereupon had been set aside.

upon appeal; for the vicar-general had jurisdiction over the subject-matter, viz. the granting administration, and there was no malice.

(a) This case was argued at Serjeants' Inn before this term.

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yet the defendants, well knowing the premises, &c. did knowingly, maliciously, and unlawfully claim and exercise pretended jurisdiction over the said suit, and without any lawful or probable cause did pronounce the plaintiff contumacious, by reason of his alleged manifest contempt of the law and ecclesiastical jurisdiction, for not taking upon him the administration of the goods, chattels, and credits of the said *D. Ackerley*, and in pain of such his alleged contumacy did decree the plaintiff to be excommunicated with the greater excommunication, and therefore did excommunicate and exclude him from the communion of the church, and afterwards did publish the said excommunication; by means whereof the plaintiff was brought to great disgrace, and put to great expences in and about procuring the sentence of excommunication to be reversed, which had been reversed accordingly, and was otherwise greatly injured. There were other more general counts. Plea not guilty. At the trial before Lord *Ellenborough* C. J., at the *London* sittings after *Hilary* term 1814, there was a verdict for the plaintiff, damages 26*l.* 13*s.* 11*d.*, subject to the opinion of the Court upon a case reserved, the material facts of which are these:

The case set forth the proceedings in the consistorial and episcopal court of *Chester*, before *Parkinson* as vicar-general, and *Mawdesley* as surrogate, in a suit promoted by *Oldham* and *Wilbraham*, having interest in the goods and chattels of *D. Ackerley*, of the city and diocese of *Chester*, deceased, against the plaintiff, the only child and next of kin of the said *D. Ackerley*. First, the proxy of the said *Oldham* and *Wilbraham* appeared before *Parkinson*, vicar-general, &c. and alleged

leged that *D. Ackerley* died intestate, leaving *Frances* his widow, and the plaintiff his only child, and that *Frances* died without taking administration, and that the plaintiff had intermeddled in and possessed himself of the goods, &c. of the said *D. Ackerley*, and that the plaintiff resided within the diocese of *Bath and Wells*, and therefore he prayed, and the vicar-general decreed, a requisition to the Bishop of *Bath and Wells*, his vicar-general, &c. to cite the plaintiff to appear before him, *Parkinson*, his surrogate, &c. in the consistory court of *Chester*, on a day given, *then and there to take on him letters of administration to D. Ackerley, and also to exhibit an inventory of all the goods, &c. of the deceased, which had come to his hands, and also to render a true account, &c.* at the instance of *Oldham and Wilbraham*, whom the proxy alleged to have an interest in the goods, &c. of the deceased. And thereupon citation is made to the plaintiff to do in manner and form above prayed, under pain of the law, &c. by the Bishop of *Bath and Wells*, in pursuance of letters of request made to him by *Parkinson* as vicar-general; and at the day and place above assigned, before *Mawdesley*, as surrogate, &c. the same citation and service thereof upon the plaintiff, are certified by the said bishop, and the plaintiff not appearing, the citation is continued to the next court; at which court, before the surrogate, the plaintiff being called, his proxy appears and prays time to shew cause to the second court, which was allowed. The case then set forth several subsequent courts at which the plaintiff's proxy prayed and obtained farther time, and a requisition to be made to the Bishop of *Bath and Wells* to take his declaration, which was not returned, and finally that at a court held before the surrogate,

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surrogate, the plaintiff was charged with contumacy in not taking upon him the administration, nor shewing cause to the contrary, and was decreed contumacious, and in pain of his contempt to be excommunicated; and it was also decreed that a requisition should go to the Bishop of *Bath and Wells* to cause him to be denounced excommunicate. And thereupon, by a schedule of excommunication, reciting that *Mawdesley*, as surrogate, &c. had pronounced the plaintiff to be contumacious by reason of his manifest contempt of the law and the ecclesiastical jurisdiction, for not taking upon him the administration, he having, as alleged, intermeddled, &c. and in pain thereof to be excommunicated with the greater excommunication, therefore *Mawdesley*, as surrogate, &c. excommunicated and excluded the plaintiff from the communion of the church; which schedule was transmitted to the Bishop of *Bath and Wells*, in order to be read in the parish church where the plaintiff resided, but was not read. Against this decree and sentence the plaintiff appealed to the prerogative court of *York*, who decreed the plaintiff to be absolved from the said sentence of excommunication, and afterwards decreed the cause to be ill appealed, and to be remitted back to the Judge from whom it was appealed, and condemned the plaintiff in costs. Against which decree and sentence the plaintiff appealed to the court of Delegates, who, by interlocutory decree, pronounced for the appeal, and interposed in the said cause, that the Judge from whom the cause was appealed, had proceeded wrongfully and unjustly, and did retain the principal cause, and therein did dismiss the plaintiff from the original citation, and from all farther observance of justice in the said cause. The

case

case then stated that the plaintiff, previously to the commencement of the above proceedings, received certain arrears of rent due in the lifetime of *D. Ackerley*, of certain estates of which *D. Ackerley* was trustee, to the amount of 72*l.* 10*s.*, and negatived that the defendants or either of them acted with any malice.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover, against both or either of the defendants; if he is, the verdict to stand against both or one of them, as the Court shall direct; if not, a nonsuit to be entered.

Two questions were made for the defendants; 1st, whether an action upon the case would lie against the Ecclesiastical Judge under the circumstances stated, it being contended by the defendants that the Judge had jurisdiction, although the proceedings were erroneous. 2dly, whether the action would lie without malice.

Richardson, for the plaintiff, argued, upon the 1st point, that the action would lie, and he denied that the Judge had jurisdiction, or if he had, still the action lies. It is laid down in 2 *Inst.* 623., "If a man be excommunicated, and offer to obey and perform the sentence, and the bishop refuse to accept it, and to assoile him, he shall have a writ to the bishop requiring him, upon performance of the sentence, to assoile him; and the reason is, that by the excommunication the party is disabled to sue any action or to have any remedy for any wrong done to him, so long as he remains excommunicate. And also the party grieved may have his action on the case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to ecclesiastical cognizance."

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nizance." The same law is adopted 3 *Bl. Com.* 101., and so, *Doct. & Stud. Dial.* 2. c. 32. "That action lieth against an Ecclesiastical Judge as well for refusing to assoile a party excommunicate, where he ought by law to be assoiled, as for excommunicating him in a matter where the Court has no jurisdiction; and though a præmunire lieth, yet the party may have an action on the case." So, 12 *Rep.* 77. *Prohibition*, "If he shew his cause to the bishop, and request him to assoile him, for this, that he was excommunicated after the offence was pardoned, or this, that the cause doth not appear to be of ecclesiastical cognizance, and he refuse to assoile him, so that he is now disabled to sue any writ of the king so long as he remains excommunicated, he may have an action *sur le case* against the ordinary, who hath done him this wrong to disable him in this case." As to what is above said of a request to be made to the bishop to assoile him, that is meant of cases where, the Judge having jurisdiction to excommunicate, the party prays to be assoiled upon matter subsequent, either as having conformed, or as being pardoned, &c. and where action against the ordinary would be for a nonfeasance only; but a request cannot be necessary where the Judge acts without jurisdiction, and where the excommunication itself being the gravamen the action lies for the misfeasance. It appears, therefore, that where the Judge has no jurisdiction, or where having jurisdiction he has refused to assoile, an action will lie. Now here the defendants had no jurisdiction; for the suit, as it appears from the prayer of the promovents, the citation and subsequent proceedings, was to compel the plaintiff to take on him letters of administration and to account, &c.;
but

but the ordinary has no jurisdiction to compel a man to take letters of administration and to account, neither will the party's intermeddling give him jurisdiction, though it will make him who intermeddles executor de son tort. If the defendants had jurisdiction to grant letters of administration to the intestate, does it follow from thence that they had jurisdiction to compel the plaintiff to take them? Or, if they might have cited him to take administration or renounce it, in the alternative, can it be said, when they have cited him to take administration absolutely, and have excommunicated him for not doing so, that this is merely error in the proceeding? Is it not rather an unlawful assumption to exercise a compulsory power, when in truth they have but a power to be exercised at the option of the party? As the defendants would have it, because they may grant administration if administration be required of them, therefore they may compel the taking of administration, if it be not required. And therefore this case does not come within the distinction taken in the *Marshalsea* case (a), when a Court has jurisdiction of a cause, but proceeds inverso ordine or erroneously; for here, for the above reasons, the Court had not jurisdiction of the cause, and the whole proceeding is coram non iudice. And in *Beaurain v. Scott* (b), which is in pari materia, damages were given against the ecclesiastical Judge, on the ground either that he had no jurisdiction, which seems to have been the opinion of Lord Eldon (c), or that he had exceeded it. By the common law, administration of the goods of an intestate belonged to the ordinary, but since the statute (d) the

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(a) 10 Rep. 76. a.

(b), 3 Camp. N. P. C. 382.

(c) *Burke's case*, 16 Pet. 348.

(d) 31 Ed. 2. c. 11.

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ordinary shall depute the next friend to administer; and therefore he ought to cite the next of kin to the deceased before he grants administration to another. But the citation ought not, as in the case at bar, to be by way of compulsion under pain of law, but only by way of notice, in like manner as upon proceedings in the admiralty-court for mariners' wages, a citation goes to the owners of the ship. If the next of kin does not come in upon citation, or comes in and renounces, administration shall be given to another, but neither his neglect to appear, nor his refusal to take letters of administration is any contempt, nor can his appearance give the ordinary any jurisdiction which he had not before. Here then, admitting that inasmuch as it was in a matter of granting administration the defendants had jurisdiction, and might cite the plaintiff as next of kin, where is the authority to shew that they shall not be liable to an action if, having a limited jurisdiction, they do an act injurious to the plaintiff, and which is clearly beyond their jurisdiction, though the occasion of it may arise out of a matter originally within their jurisdiction? From the point where the excess begins the jurisdiction ends, and they are acting without jurisdiction; and that seems to be the principle which governed *Terry v. Huntington* (a). And *Groenvelt v. Burwell* (b) is not an authority in favour of the defendants, because it was there held that the persons against whom the action was brought had jurisdiction to decide on the matter, and to convict and fine, and their judgment upon a matter of fact within their jurisdiction was not traversable. 2dly, That the action will lie without malice. *Com. Dig.* (c) says, "An action upon the case

(a) *Hardr.* 489. (b) *Salk.* 396. (c) Action upon the case, A.

is an action founded upon a wrong;" it does not say a malicious wrong. Again, "In all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." Now, though it be no wrong if a Judge in a matter within his jurisdiction form an erroneous opinion, because a duty is cast upon him, and he is protected as to errors in judgment, yet it is otherwise if, having only a limited jurisdiction, he outsteps the bounds of it, or acts where he has none, by which a damage accrues to another. That excommunication is a damage need hardly be stated, for by it the party is deprived "de fidelium communione & ab omni actu legitimo." Also "cum excommunicato nec orare, nec loqui phlam aut absconditè, nec vesci licet" (a). And what does it matter to the party grieved what the motives were for the act from which his damage arises? Therefore if a man stop up a way, whereby A. cannot pass to his colliery (b), or if he disturb A. in his common or the like, an action upon the case lies, and it is no answer that it was done in bonâ fide assertion of a right and without malice.

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Phillipps, contra, contended that the action would not lie. And he took this distinction, that if the ecclesiastical Judge proceeds to excommunicate where he has no jurisdiction, an action lies against him, but if he has jurisdiction, there, although he wrongfully proceed to excommunicate, no action lies. And he said the same distinction was taken in the *Marshalsea* case (c), and by *Holt* C. J. in *Groenvelt v. Burwell* (d),

(a) *Co. Lit.* 133. b.(b) *Sulk.* 15.(c) 10 *Rep.* 76. 2 Resolution.(d) 1 *Lord Raym.* 466.

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by *Powell B. in Guinne v. Poole (a)*, and by *De Grey C. J. in Miller v. Searc (b)*. Then it is plain that here the defendants had jurisdiction over the person of the plaintiff, and also over the subject-matter, viz. the administration of the intestate's effects, and were empowered by the statute to make an administrator, and might have cited the plaintiff, as next of kin to the intestate, either to take administration or to renounce it (c). And if the plaintiff had refused to appear upon such citation he would have been punishable for a contempt (d). The plaintiff, however, appeared by proxy, and might have shewed cause, and it is plain that he so understood it, notwithstanding the form of the citation, for he did not object to the citation, but prayed and obtained time; so that, as far as in him lay, he has given the Court jurisdiction. Formerly it seems that the ordinary might compel a person named executor to prove the will, if he had meddled with the goods as executor (e), and likewise, where there was no will, if a person intermeddled, the ordinary might compel him to become administrator. Accordingly in *Ought. ordo judiciorum (f)*, "Temeraria Administratio" is mentioned as one cause of suit before the ecclesiastical Judge. That practice is now no longer in use, nor is it material to the defendants that it should be, because it is enough to protect them if they had jurisdiction to call upon the plaintiff to take administration, without shewing that they could have compelled him. And therefore, admitting that their citation, which left the plaintiff no option but that of

(a) 2 Lutw. 1560.

(b) 2 Bl. Rep. 1145.

(c) 4 Burn's E. L. 280 7th ed.

(d) *Ibid.* 248.

(e) *Ibid.* 240.

(f) *De causis testamentariis, Tit. 220, 1.*

taking

taking administration, was void, still it was no more than an erroneous proceeding in a cause over which the Court had jurisdiction, for which the Judge shall not be answerable. So, in *Birch v. Lake* (a) it was held that a citation ex officio, which was in use while the oath ex officio continued, was not allowed after the stat. 17 *Eliz.* had ousted the oath (b); and therefore a prohibition was granted to the vicar-general who had issued it; yet the Court said, "the party grieved could have no action against the vicar-general, being a judge, and having jurisdiction of the cause, though he mistake his power." And that cause must have been either testamentary or matrimonial, because in no other, as it seems, was the oath ex officio ever administered (c). 2dly, Malice being negatived, it must be taken that the defendants acted under error of judgment only, for if they knew what they did to be beyond their jurisdiction, that would be malicious. Then, upon the authorities, it appears from *Com. Dig.* (d) that if the matter be out of the jurisdiction the party may have his remedy by a prohibition to stay the suit, even after sentence (e), and if his person or goods be taken, in which case a prohibition would not afford a remedy, he may have trespass. Also, where a damage accrues to another by the negligence or misfeasance of a person in a ministerial office, an action on the case will lie (f): as if the commissioners of the lottery do not adjudge a prize to the person entitled to receive it (g), or commissioners of bankrupt improperly commit (h), or a

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(a) 1 *Mod.* 185.(b) See *Stats.* 16 *Car.* 1. c. 11. s. 4, 13 *Car.* 2. c. 12. s. 4.(c) 2 *Inst.* 657.(d) *Courts*, P. 15.(e) *Leman v. Gaulty*, 3 *T. R.* 3.(f) *Bull. N. P.* 73.(g) *Schinotti v. Bumsted*, 6 *T. R.* 646.(h) *Miller v. Seare*, 2 *Bl. Rep.* 1141.

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justice of peace refuse an examination upon the stat. 27 *Eliz.* (a). But this is an action without a precedent, in which a judge acting in a matter within his jurisdiction is to be made liable for having mistaken his power. It is plain that in the passage cited from 2 *Inst.* 623. something more than an error in judgment was meant, because it adds, "Also the bishop in those cases may be indicted." And in a case analogous to the present, *Lawrence J.* said, "there was no instance of an action of this sort maintained for an act arising merely from error of judgment," and because it was not proved that the defendants acted maliciously, the action was held not to lie (b). There are other cases which go to shew that even if the defendants had proceeded entirely without jurisdiction, the action ought to have been laid falsò et malitiosè, and so proved, as in *Carlion v. Mill* (c), it was so laid and sustained upon that ground, and yet the citing the plaintiff ex officio, which was the cause of action there, was wholly without jurisdiction. *Windham v. Clere* (d) recognized in *Barnardiston v. Soame* (e), and *Hocking v. Matthews* (f), are to the same point; and in *Hodson v. Cooke* (g) exception was taken in arrest of judgment that it was not alleged that the defendant knew that the place where the action arose was out of the jurisdiction; but it was held by three judges against one to be aided by verdict. Upon which *Powell B.* remarks that he thought it strange that the git of the action should be aided by verdict (h). And in *Goslin v. Wilcock* (i) Lord Camden laid down the rule, "that if you hold a

(a) *Green v. Hundred of Bynclchurch*, 1 *Leon.* 323.

(b) *Harman v. Tappenden*, 1 *East*, 555. (c) *Cro. Car.* 291.

(d) *Cro. Eliz.* 130. (e) *Polluxf.* 472. (f) 1 *Pent.* 86.

(g) *Ibid.* 369. (h) 2 *Lutw.* 1572. (i) 2 *Wils.* 307.

man to bail in an inferior court when you know it hath not jurisdiction, and *with malice*, an action upon the case lies."

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Richardson, in reply, said that it did not follow from *Burn's E. L.* that the plaintiff was liable to be excommunicated, because he was punishable for a contempt; neither did *Ought*. prove that the ordinary could compel a person to take administration. And the decree of the Delegates in the case at bar shewed that he could not, and therefore they dismissed the plaintiff from the citation ab origine, because it had for its object the compelling him to become administrator under pain of excommunication. What the Court said in *Birch v. Lake*, beside that it was extrajudicial, is very doubtful, for after an act of parliament has ousted the judge of jurisdiction, it seems strange to say that, if he will nevertheless proceed, the party grieved shall not have an action. It is contrary to Lord *Coke* and the authorities before cited. The other cases mentioned for the defendants for the most part turn upon the distinction applicable to actions for malicious prosecutions, where malice must be proved; and as to the answer given to 2 *Inst.* 623. it by no means follows, because it is said the bishop might be indicted, that therefore malice must have been intended in those cases; for in many cases where there is no malice, as for doing acts, or refusing to do them, where the public is concerned, or a public duty is cast upon a man, an indictment lies.

LORD ELLENBOROUGH C. J. If it were necessary I should like to look at several of the authorities which have been cited. But the impression of my mind at

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present is, that this action is not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter; and that it had general jurisdiction over the subject-matter, and in regard to some of the particulars mentioned in the citation, there can be no doubt. I accede, however, to the decision of the Court of Delegates that this citation, must be considered as a nullity. It has left no election to the party cited, but obedience to its requisitions; whereas it should have given him an election to shew cause why he should not obey them. As far as citing him, the ecclesiastical Judge certainly had authority to cite him, as next of kin, to appear, in order to take on him letters of administration, or to shew cause why he should not. I do not touch upon the effect of his having partially administered by intermeddling with the goods of the deceased: but certainly the ecclesiastical court has authority to cite the next of kin to take upon him administration, or shew cause, and if he does administer, to call upon him to give an account of the goods and credits of the deceased. The party is bound, if he will take administration, to give an account of it, though it may be that the ordinary could not call on him at that moment to do so, and to give an account of effects of which he had possessed himself by an irregular intermeddling. But of this I am certain, that the ordinary had jurisdiction to call upon him to shew cause why he should not take administration or renounce it; and this citation had so done, I do not see that there would have been any material objection to it. But can any one say that the ordinary had no jurisdiction to call on him? It is true that the defendants should have given him an opportunity of being heard to explain his reasons,

sons, and to make his election; and that not having so done by their citation, the citation is bad; and therefore the Court of Delegates have decided rightly. But at the same time I cannot see that the defendants were wholly without jurisdiction, and I think they would have had it to the full extent, if they had but given him an election. And that the plaintiff himself understood that they had some jurisdiction appears from his having prayed for further time. The difficulty here is to pronounce that they had no jurisdiction, except so far as they have not cited him to shew cause. This mode of considering the question does away the bearing of several of the authorities cited in argument; for the authority of Lord *Coke*, and the other cases, supposes that the Judge has no jurisdiction over the subject-matter, in order to make the action maintainable against him: but here I think it is clear that he had jurisdiction over the subject-matter. And no authority has been cited to shew that the Judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or as it is termed *inverso ordine*. Malice forms no ingredient in the present case; therefore it stands on the irregularity, and error in the proceedings only, and where that is so, and the Judge has jurisdiction over the subject-matter, the cases shew that no action lies. On these grounds it strikes me at present that here no action is maintainable: if it were necessary it might perhaps be fit to look at the authorities to see how far the defendants had jurisdiction to compel the plaintiff to take administration. It seems to me that this citation was defective only in some formal particulars, or perhaps it may be called a defect in substance; but still there was no want of original

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original jurisdiction, and if so, it appears from all the authorities that the defendants are not liable.

LE BLANC J. I am of opinion that the present defendants are not liable in this action. We must take it for granted upon this statement that they were wrong in issuing the excommunication, and likewise wrong in the citation. That I think is to be assumed from the ultimate decision of the Court of Delegates, which is a court of competent jurisdiction, and whose sentence is to be considered as compulsory on us. But when I say that what the defendants did in these respects was wrong, I cannot say that what they did was wholly illegal, inasmuch as the subject-matter was within their jurisdiction. And there is a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction, and a case where he acts wholly without jurisdiction. In this case the subject-matter was peculiarly within the jurisdiction of the ecclesiastical Judge, and within his jurisdiction only, being a matter of granting letters of administration to a person who died intestate within the diocese. It appears by the proceedings that they were instituted against the plaintiff in the ecclesiastical court, as next of kin to the deceased, and that it was suggested that the plaintiff had intermeddled with the goods of the deceased; and thereupon a citation was prayed and issued. Therefore it appears that the subject-matter was peculiarly within the jurisdiction of the ecclesiastical Judge, and that the first step that was taken before him was also strictly within his jurisdiction. But it appears also, that in the course of the proceedings in the original cause the defendants have acted erroneously

in the form of their citation; for we must take the citation to be wrong in calling on the plaintiff absolutely to take letters of administration instead of calling upon him to take letters of administration, or to shew cause why he should not, or renounce the taking them upon him; but that is no more than an error in proceeding in a matter over which they had jurisdiction. The whole fallacy of the argument lies in considering every step taken in the cause as an excess of jurisdiction, because some steps have been erroneously taken; whereas the distinction is, that where the subject-matter is within the jurisdiction, and the conclusion is erroneous, although the party shall, by reason of the error, be entitled to set it aside, and to be restored to his former rights, yet he shall not be entitled afterwards by action to claim a compensation in damages for the injury done by such erroneous conclusion, as if, because of the error, the Court had proceeded without any jurisdiction. It seems to me that this is not the case of a court having proceeded altogether without jurisdiction, or having exceeded its jurisdiction, but of a court having jurisdiction, and having, in the course of the exercise of it, come to an erroneous conclusion, which has been the cause of the damage.

BAYLEY J. I agree with the Court that this action cannot be sustained. The only authorities cited for the plaintiff are those where the ecclesiastical Judge has either refused to assolve the party when he was entitled to be assolved, or where he has acted wholly without jurisdiction. And the great press of the argument has been to shew that here the ecclesiastical Judge had no jurisdiction over the subject-matter. The
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fallacy of that argument lies in not properly adverting to what is the subject-matter of the suit. The subject-matter is the granting administration of the intestate's effects, and with a view to that all the proceedings are instituted. What the proceedings are to be in order to obtain administration, depends entirely on the mode and practice of proceeding of the ecclesiastical Court. Whether that Court will grant administration or not to any person before citation goes, or certain previous steps be taken, is a matter which they must know as connected with their practice; but how are we, as Judges of the common law, to know whether their proceedings have been such as the civil or canon law requires? Our knowledge of what is conformable or not to that law is chiefly derived from our practice of exercising jurisdiction over those courts in the matter of granting prohibitions. If it appears that the ecclesiastical Judge has either no jurisdiction, or has exceeded his jurisdiction, this Court is in the habit of interposing by granting a prohibition. But if the spiritual Court has jurisdiction, I am not aware of any instance in which this Court has granted a prohibition, except in cases where it proceeds to the trial of a matter triable only by the common law, or allows a thing not allowed by the common law, or where the construction of a statute, which is peculiarly confined to the common law, comes in question. If then the ecclesiastical Judge had jurisdiction in this case, on what foundation does this action stand? There is no other foundation than this, that the ecclesiastical Judge, who had jurisdiction, has not framed his citation in the form in which it ought to be, or that he has pronounced excommunication sooner than he ought, or
 that

that he has adopted a proceeding which the course and practice of the ecclesiastical Court do not warrant. But that is nothing more than error in the exercise of the judicial functions with which he is invested. Therefore I do not think that this action is maintainable upon any legal principle. It is said that this citation ought not to have issued, and that excommunication ought not to have been pronounced; but I do not know that, except as I find it has been so determined by other courts, within whose cognizance it peculiarly lies to determine it, and I accede to it; but I have no knowledge of it as a judge at common law.

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Judgment of nonsuit. (a)

(a) *Dampier J.* was absent from Serjeants' Inn.
See stat. 53 G. 3. c. 127.

BARBER *qui tam against* TILSON. (a)

Monday,
Jan. 23d.

DEBT on stat 52 Geo. 3. c. 39. s. 34., brought with the consent and by the direction of the corporation of *Trinity House, Deptford Strond*, to recover two penalties of 50*l.* each from the defendant, for continuing in the charge of two vessels without being duly licenced to act within the limits in which such vessels were, after a pilot duly licenced to act had offered to take charge of them. And the venue was laid in *London*. Plea, *nil debet*. At the trial before Lord *Ellenborough C. J.* at the *London* sittings after *Michaelmas* term 1813, it appeared that the acts done by the defendant, upon which the action was grounded, were done on the river

In debt upon
stat. 52 G. 3.
c. 39. (pilot act)
for penalties for
continuing in
the charge of
vessels without
being licensed,
the venue must
be laid in the
county where
the offence is
committed.

(a) Cause was shewn at Serjeants' Inn before this term.

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Thames, and in a part of it which is either in the county of *Middlesex*, or in the county of *Surry*, and not in *London*. Exception was taken that being an action on a penal statute it was local, and the venue ought to have been laid in the county where the offence was committed, and thereupon the plaintiff was nonsuited. In the following term a rule nisi was obtained for a new trial, and upon the rule afterwards coming on, the Court directed the facts to be stated in a case for their opinion upon the question, whether the venue was properly laid in *London*. If the Court should be of opinion it was, the nonsuit to be set aside, otherwise to stand.

F. Pollock for the plaintiff argued that the venue was well laid in *London*. And he said that the stat 31 *Eliz.* c. 5. s. 2., which forbids "the offence against any penal statute being laid in any other county than where it was committed," applies only to statutes then existing, and not to subsequent statutes. And so in the construction of the statute 21 *Jac.* 1. c. 4. which is in *pari materia*, it has frequently been determined, that it does not extend to any offence created since that statute; yet that statute (s. 2.) uses the words "any penal statute," as well as the statute of *Eliz.* The decisions upon the statute 21 *J.* 1. are *Rex v. Gaul* (a); *Hicks's case* (b); *Attorney-General v. Browse* (c); and note to *A. G. v. Moyer* (d); *Harris v. Rayney* (e); *French v. Caxon* (f); more fully reported in a note to *Schw. N. P.* 579. 3d ed. (g); and *Attorney-General v. Ferris* (h). It is true that the statute of *Eliz.* s. 4. ex-

(a) 1 *Salk.* 372. 3 *Salk.* 199. 2 *Lilly's Abr.* 81. (b) 1 *Salk.* 373.(c) *Bunb.* 236. (d) *Ibid.* 261. (e) Cited 2 *Str.* 1081.(f) *Ibid.* (g) See also *Andrews.* 25. (h) 3 *Anstr.* 871.

cepts some cases of offences against future statutes, such as for engrossing, &c. from the necessity of laying the venue in the proper county; whence it may seem as if the legislature meant to leave all other cases of offences against future statutes, not excepted, to the operation of the statute; but that would be drawing a general inference from a special exception, which was only introduced *ex majori cautela*, and for a particular purpose. And the legislature have not left it to inference, where they intended to include future statutes; for in the very next section, (*s. 5.*) which limits the time for bringing actions, &c. upon penal statutes, the words are, "upon any statute penal made *or to be made.*" Again, between the 31 *Eliz* and 21 *Jac.* not less than 33 statutes were passed, creating upwards of 70 penalties, and yet there does not appear to be any instance in the books where it was ever held that the statute of *Eliz.* applied to them. On the contrary, Lord *Coke*, 3 *Inst.* 192., in his reading upon the stat. 21 *Jac.*, declares one of the mischiefs intended to be remedied by that statute was, "that in informations, &c. the offence supposed to be against the penal law, and to be committed in one county, was at the pleasure of the informer, &c. alleged in any county where he would." This shews what the practice was in the interval between the two statutes; and indeed it is not easy to account for the provision in the stat. 21 *Jac.* as to the venue upon any other ground than because the statute of *Eliz.* was considered as inoperative in that respect. Also there would have been no necessity for express provisions to confine the venue in many subsequent statutes, viz. 21 *Jac. c. 17. s. 3.* against usury, 21 *Jac. 1. c. 18. s. 12.* respecting the making of woollen cloths, 12 *Car. 2. c. 13. s. 3.* against usury,

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usury, 12 *Car. 2. c. 32. s. 5.* against exporting wool, if the statute of *Eliz.* was an existing operative enactment affecting all subsequent penal statutes. *Com. Dig. (a)* does indeed consider it as a subsisting statute, but cites no case by which it appears ever to have been treated as such since 21 *Jac. 1.*; whence it may fairly be concluded that the statute of *Jac.* enacted all that the statute of *Eliz.* did before, and superseded it. And as the confining of the venue operates in abridgment of the general right of the party to sue, therefore it ought not to be extended, particularly as it has been said in some of the cases that the statute applies only to common informers, and here the plaintiff does not sue in the character of a common informer, for he sues by licence from the *Trinity-house* under 52 *G. 3. c. 39. s. 72.* If in cases like the present the offence must be confined to the county, the difficulty of ascertaining the precise limits upon the river, is such, that it will oust the *Trinity-house* of almost all the means of repressing offences against the pilot-act.

Gurney, contra, denied that the stat. 21 *Jac.* was in pari materiâ, or could afford any rule for the construction of the statute 31 *Eliz.*, for the statute 21 *Jac.* does not controul any of those statutes upon which penal actions are to be brought in the superior courts. And such was the result of Lord *Kenyon's* opinion in *Leigh v. Kent (b)*, after he had looked into the old cases on this subject; and *Buller J.* agreed thereto. And the same appears also from 3 *Inst. 192.*, which states as the second mischief intended to be remedied by the statute of *Jac.* the intolerable charge of the subject in being

(a) *Til. Action, N. 10.*(b) 3 *T. R. 364.*

drawn to the king's courts at *Westminster* upon informations for offences against any penal law. Then upon the statute of *Eliz.* it is plain that where the intention was to confine it to by-gone statutes it is so expressed, as in s. 1. the language is, "any penal statute, *that before that time hath been*;" but in s. 2. the words are general, "any penal statute." And the exception in s. 4. is decisive to shew that by the words "any penal statute" the legislature meant to include future statutes, for otherwise why except any future statute from the operation of the 2d section? And as to the conclusion drawn from the 5th section having expressly mentioned "statutes made or to be made," viz. that the general words in the 2d section are to be restrained to statutes then made, the contrary seems to be the better conclusion, unless it can be shewn that the limitations as to the venue and as to the time of bringing the action were not meant to be co-extensive. In *Butterfield v. Windle* (a), and in *Robinson v. Garthwaite* (b), both of which were actions for penalties on recent statutes, it was never doubted but that the offence must be laid in the proper county. And in *Bull. N. P.* 194. the statute of *Eliz.* is particularly set forth as a subsisting statute. With regard to the supposed difficulty of ascertaining the limits of the county, it may be answered that it is no greater in this case than in every other where the crown is concerned to prosecute for any offence committed.

F. Pollock, in reply, observed that *Bull. N. P.* 195. mentions the stat. 31 *Eliz.* solely for the limitation of

(a) 4 *East*, 385.

(b) 9 *East*, 296.

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the time of action, but refers to the 21 *Jac.* for the venue; which shews that as to the venue the latter was considered as the only subsisting statute. And as to the words of the 1st section of stat. 31 *Eliz.* "that before that time hath been," they do not refer to statutes, but to *persons* that before that time had been ordered not to prosecute upon penal statutes. Therefore the argument derived from the supposed wording of that section fails. Also *Butterfield v. Windle* does not appear to have passed upon the ground that all penal actions were local, but that the particular offence in that case was a *local* omission of a *local* duty, and therefore justly to be confined to the place where done.

LORD ELLENBOROUGH C. J. I think upon the construction of the statute of *Eliz.* there cannot possibly be a fair doubt in this case. The only doubt raised is upon the statute of *James*, whether that be an entire and absolute repeal of the statute of *Eliz.*, or only a repeal to a certain extent and for certain purposes, and merely to obviate some inconveniences which were unprovided for by the statute of *Eliz.* namely, to prevent the vexation arising to the subject from being drawn to a distance from his residence in order to attend on the administration of criminal justice in the courts above, and to confine the prosecution of penal actions to the courts below. That the statute of *Eliz.* is of universal operation and extent, is clear from ss. 1, 2, 3, 4, and 5. As to the words in the first section, "that before that time hath been," I agree with the learned counsel for the plaintiff that they do not seem to relate to previous statutes, but to the persons that before that time had been ordered not to follow any

suit upon any penal action. The clause is somewhat perplexed in its phrase, and I do not wonder that the learned counsel on the other side thought it susceptible of a different interpretation. The words are, "that no person other than the party grieved shall be received to inform or sue upon any penal statute, that before that time hath been for any misdemeanour," — if it had stopped there it must have meant statutes, but it goes on, — "by order of any of the Queen's courts, ordered not to follow or pursue any suit upon any penal statute;" — that is, no person that hath been ordered, &c. If the words, "that before that time," to the end of the clause, instead of being placed where they are, had followed immediately after "that no person other than the party grieved," so as to precede the words "shall be received," &c. then this construction would have followed in continuity of text according to the natural and sensible order of the words. Then we come to the second section, which enacts, "that in any declaration or information to be exhibited, the offence against any penal statute shall not be laid to be done in any other county but where the contract or other matter alleged to be the offence was in truth done; and that every defendant in such action or information shall and lawfully may allege that the offence supposed to be committed was not committed in the county where alleged." Here we find the words are "against any penal statute." Is there any way in which it could have been couched in more general words? Can we conceive any thing more comprehensive? If the language had been, "no action upon any penal statute shall be brought," would that have been more comprehensive of all statutes entitled to the description of penal statutes?

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tutes? This cannot but relate to statutes both in time past and in future. Then the third section provides, "that the act shall not extend to any such officers of record as have in respect of their offices heretofore lawfully used to exhibit informations or sue upon penal laws; but that they may inform and pursue in that behalf as they might have done before the making of the act." This is a saving of the rights of officers of record to sue without being subject to the restrictions imposed by the act. Then comes a provision in the 4th section which says, "that the act shall not extend to the laying or alleging of any offence in any declaration or information for or concerning certain offences therein named, or any offence committed against certain acts therein also named, or for any offence comprized in any statute made, or *to be made*, against ingrossing, &c. where the penalty is twenty pounds or above." Therefore this exempts from the operation of the statute certain descriptions of offences committed against particular statutes; but how could it be necessary to exempt offences against statutes *to be made*, in any one instance, if in no one instance the provisions of this statute were meant to relate to future statutes. The argument arising from this exemption seems to me to be irresistible. To make a special exemption where there was an entire exclusion existing before is perfectly incongruous. Then we come to the 5th section, which enacts, that "all actions, &c. for any forfeiture upon any statute penal made or *to be made*, whereby the forfeiture is or shall be limited to the crown, shall be brought within two years after the offence," &c. This regulates the time for bringing the action, and it imposes a limitation of time in respect of all actions upon penal statutes made, or *to be made*; therefore

therefore a strong and most irresistible conclusion arises on the face of the statute, that its operation was meant to be general and universal, comprehending all statutes, both before and behind, antecedent and subsequent. Then follows the statute of *James*, which was passed in ease of the subject, and to prevent the vexation arising by reason of the commencement of prosecutions for offences against divers penal statutes in the courts above. I had conceived that the object of this statute was to redress that grievance only; for that as to the provisions relating to the venue, they were only in conformity with the statute of *Eliz.* The statute recites, "that prosecutions may better be commenced, prosecuted, and tried in the counties where the offence shall be committed;" that is, from the institution of the prosecution to its close all proceedings should be in the county where the offence was committed. The preamble goes on to recite, "that the poor commons of the realm are grievously vexed by being prosecuted and forced to appear in the courts at *Westminster*;" therefore the grievance aimed at was the drawing them up from their homes to the courts at *Westminster*. For remedy of this grievance the statute enacts, "that all offences against any penal statute shall be commenced, sued, prosecuted, tried, recovered, and determined by action, &c. before the justices of assize, of nisi prius, of oyer and terminer, and justices of gaol delivery, or before the justices of peace of every county, &c. wherein such offences shall be committed, in the courts, places of judicature, or liberties respectively, and not elsewhere." This confines the suit to a provincial commencement and provincial termination of it. The informers are to file their bills before any of these descriptions of jus-

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tices, when they come into their counties. And the clause farther enacts, "that all informations, actions, &c. either by the Attorney-General or by any officer or other person in any of the courts at *Westminster*, for any offences aforesaid, shall be void." This cuts down the power of the Attorney-General to commence or prosecute any information or suit for offences against any penal statutes before then made; but it leaves his power entire in respect of any subsequent statutes. It goes on in the 2d section to enact "that in all informations and actions for any offence committed or to be committed against any penal statute, the offence shall be laid in the county where it was committed, and not elsewhere, and upon default of proving that the offence was laid and committed in the same county, then the defendant shall be found not guilty." So that it enforces the commencing these informations or actions in the courts below in their proper counties. It also accompanies this restraint with a special provision as to the necessity of observing locality in laying the offence in such informations and actions. Then in the 3d section it further requires an affidavit to be made that the offence was committed in the county where the suit was commenced. Upon this statute alone it has been contended, that the restraint imposed by the statute of *Eliz.* is taken away. But that object is expressly disavowed; for so far from taking away the restraint, the statute of *James* enforces the necessity imposed by the stat. of *Eliz.*, by enacting that the suit shall be prosecuted and laid in the proper county, and it accompanies the enactment by requiring an affidavit to shew that it is in the proper county. The statute of *James* therefore is further auxiliary to it. But that statute has been construed to extend only to antecedent statutes,

and

and every instance where an action has been brought in any of the courts at *Westminster* upon any subsequent penal statute, is an authority given both by the courts and the parties themselves, that it must relate to antecedent penal statutes only, and not to subsequent ones. Recurring then to the stat. of *Eliz.* which is so clear, we may fairly call in aid of it the constant practice that has obtained in all penal actions, of laying the offence in the proper county. There do not appear to be any cases upon the subject except those in the Exchequer, which being upon the information of the Attorney-General are cases excepted out of the statute, or those which turned upon the want of an affidavit as required by the statute of *James*. I cannot therefore form a doubt in my own mind but that the statute of *Eliz.* is in full force as well as to venue as to limitation of time. The point was not disputed in the two instances cited of *Butterfield v. Windle*, and *Robinson v. Garthwaite*. It was not made a question upon the argument in those cases, that the stat. of *Eliz.* was not in force, or that penal actions were not to be confined to their proper counties. And it seems to have been the universal persuasion that the statute of *Eliz.* has full operation and force, and has the effect of restraining the venue in all penal actions except in the cases in the Exchequer, which are at the suit of the Attorney-General; and which practice may be sustained on the exception contained in the statute. If any hardship or inconvenience is likely to press on the respectable and important body whose interests are now in question, in consequence of any difficulty of ascertaining precisely when offences are committed within the limits of *London* or *Middlesex*, the better way will be to make application to the legisla-

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ture in order to have that difficulty obviated, by exempting them from the restraint imposed by this statute. But that cannot be an argument to affect our construction; it is sufficient for them to have brought the case before the Court, and to have had the point settled by our construction of the statute. The rule will be considered as having now been settled, that the statute of *Eliz.* is in full force, and has a binding effect.

LE BLANC J. There are two questions in this case: first, whether the statute of *Eliz.*, which requires the venue to be laid in the county where the offence is committed, is in force at this day; and next, whether it applies to penal statutes which have been passed since that statute. The question originates in an action of debt for a penalty given by the stat. 52 Geo. 3. c. 39. That is a recent act of parliament which gives a remedy by action in the courts of record at *Westminster* for a penalty imposed on the particular offence here alleged. Now the statute of *Eliz.* begins by prohibiting certain persons from being received to inform or sue upon any penal statute; that is the general language of the first clause; and the 2d section, which regulates the laying of the venue, and upon which this objection is raised, uses language as general, that the offence against any penal statute shall not be laid in any other county but where it was in truth done. There is also another clause (s. 5.) in its object highly remedial to the subject, which limits the time for bringing actions upon penal statutes. And both that clause, and the clause which immediately precedes and follows it, speak in language which cannot be mistaken of penal statutes made or to be made. The first of those clauses excepts from the necessity

necessity of laying the venue in the proper county, in actions or informations for certain specified offences, and amongst others, for any offence comprised in any statute made or *to be made* against engrossing, &c. This strongly fortifies the more enlarged interpretation of the words "any penal statute" in the second section; for unless those words were meant to comprehend future as well as present statutes, where could be the necessity of excepting any cases upon statutes *to be made*? The next clause is that which limits the time of bringing the action in cases where the forfeiture is limited to the crown only, to two years; and in other cases where it is limited to the crown and the prosecutor, to one year after the offence committed. There we find also that the clause speaks of any statute penal *made, or to be made*. Therefore if the construction to be put upon the words *any penal statute* in the 2d clause shall not hold that they extend to subsequent statutes, the consequence will be, that the statute must in one branch of it, relating to the time of commencing the action, be supposed to have imposed a limitation extending both to present and future statutes, but in another branch, relating to the venue, to have imposed a limitation extending only to statutes then existing. That, I think, would be a construction so incongruous that the Court will not be inclined to adopt it. And therefore for avoiding any such incongruity we must construe the general words, "any penal statute," in the second section, to have the same import as the words in the fifth section, "any statute made or to be made." In the sixth section the language is somewhat different; it provides, that where any action, &c. is *or shall be* limited, by any statute penal, to be commenced within a shorter time

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time than is limited by that statute, it shall be brought within such shorter time. This proviso by its language clearly carries forward the limitation as to time with a view to its being applied to future statutes wherein no shorter limitation is expressed, providing that where a shorter time *shall be* limited by any penal statute, the limitation in the statute shall not interfere with it. I should therefore think that, taking the question upon the statute itself, assuming it to be in force, we must conclude that it was meant to apply as well to subsequent as to former statutes. But it is said that the statute of *James* either repeals the statute of *Eliz.*, or that the construction which has been put upon the statute of *James* is an authority for a like construction of the statute of *Eliz.* But I think that the statute of *James* is not a repeal of that statute; it contains no words of repeal, and was passed *diverso intuitu*. Before the statute of *James* informations and actions upon penal statutes might have been brought in the superior courts at *Westminster*; and the whole object of that statute was to do away such informations and actions in the courts at *Westminster*, and to confine the bringing of them to the inferior courts, in the counties where the offences were committed. That is its whole object, and all its regulations will be found applicable to such informations and actions. The statute does not profess to limit actions brought upon penal statutes in the superior courts at *Westminster*; on the contrary it enacts that no action shall be brought in the superior courts there. The statute, therefore, only restrained the laying the venue in such actions as should be commenced under it; and it required an affidavit to be made that the venue was properly laid in such actions. Subsequent decisions which

which have been alluded to in argument, have determined that this statute does not extend to subsequent penal laws, but has reference only to statutes of a prior date. The Judges probably thought that the statute, on account of its narrowing the jurisdiction of the courts above, and of the Attorney-General, ought not to receive a more extended construction than the language of it required; or probably for the reason which is adopted in *Buller's Nisi Prius*, that where a subsequent statute gives an action of debt, or other remedy for the recovery of a penalty, in any court of record generally, it so far impliedly repeals the 21st of *Jac.* It seems to me then that the statute of *James* does not repeal the statute of *Eliz.*, and that the same reasoning and argument which probably led the courts to determine upon the construction of the statute of *Jac.* that it did not extend to subsequent penal statutes, do not apply to the statute of *Eliz.*, and therefore that the latter statute is in full force with respect to the limitation of time and venue in all penal actions. As far as the statute of *James* was in force, it had in fact pro tanto repealed the statute of *Eliz.*, because having confined informations and actions to the inferior courts, it followed that those informations and actions must depend on the regulations of that statute. But actions which lie in the superior courts all fall under the statute of *Eliz.* and must on that account be brought in the proper county where the offence was committed, and within the limited time, except where it is limited, as by the pilot-act, to some other time (a). It seems to me, therefore, that the nonsuit was right.

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BAYLEY J. I entirely agree that the statute of *Eliz.* is a subsisting statute, and to be extended to subsequent penal statutes, and consequently that the venue in this case is improperly laid. That statute has been fully commented on by my Lord and my Brother *Le Blanc*, and it is sufficient for me to say that I concur with their comments upon it. The second section directs that the offence against any penal statute shall not be laid in any other county but where it was done. This provision is general in its terms, and is capable of being restrained to by-gone statutes only, or of being extended to by-gone and also to future statutes. But when I find in a subsequent clause, viz. the fourth, that an exception is made of offences comprized in any statute *to be made* against engrossing, &c. I think I must conclude that it was the intention of the legislature to extend the second section to subsequent statutes; for otherwise those words of exception would be perfectly unnecessary. If then the statute of *Eliz.* applies to subsequent statutes, how is it affected by the statute of *Jac.*? That statute does not contain any express words repealing the statute of *Eliz.*; and if so, it can only be a repeal so far as it contains provisions inconsistent with that statute. Granting that the statute of *Jac.* is not to be confined to proceedings in the inferior courts, that will not make good the argument that it repeals the statute of *Eliz.* For the second section of the statute of *Jac.* provides that in all informations and actions the offence shall be laid in the proper county. If that is to be confined to informations and actions in inferior courts, cadit quæstio as to its repealing the statute of *Eliz.* If it is not, but is to be extended to informations and actions in the superior courts,

courts, it will then have a general relation to all informations and actions as well upon future statutes as upon statutes then passed. We cannot say that it repeals the statute of *Eliz.*, without at the same time saying that the second section extends to subsequent statutes. If it does not, it leaves the statute of *Eliz.* as to its operation upon subsequent statutes untouched. The true construction, as I apprehend, of the statute of *Jac.* is that it applies to such actions only as are brought before the several courts mentioned in the statute, in the counties where the offence was committed, and not to actions in the superior courts at *Westminster*. The first section confines the prosecution of all offences against penal statutes to such local courts, and the second section enacts that the offence shall be laid and proved in the county. Considering the statute of *Jac.* as thus restrained, it renders all the decisions upon subsequent statutes, that have been cited, consistent with the statute of *Eliz.*, because all those decisions will be found to come within the exception in the statute of *Eliz.*, but there is no exception in the statute of *Jac.* The statute of *Eliz.* contains an exception, that it shall not extend to officers of record; this of course extends to informations by the Attorney-General; and almost all the cases cited have arisen upon informations by the Attorney-General. I recollect when this case was moved, it was said, that by the statute of *Ann.* against usury, the offence was confined to the county by an express provision, and thence an inference was drawn that the statute of *Jac.* did not extend to subsequent penal statutes; but it now appears that that provision was necessary to meet the exception in the fourth section of the statute of *Eliz.* as to usury. Both the statute

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tute of *Jac.* and that of *Ann.*, as it seems to me, are consistent with the notion that the statute of *Eliz.* is an existing statute. And certainly it would have been remarkable, if so inveterate a practice as that of requiring the venue to be laid in the particular county in all penal actions, should have proved to have been founded upon a mistake pervading not only our own times, but all preceding times. It was considered to be necessary in *Sibly v. Cuning* (a) where it was made a question whether the statute of *Jac.* extended to subsequent statutes; and Mr. *Mansfield* in the course of his argument said, "it was an invariable rule that the action must be brought in the particular county." He gave a wrong reason indeed, though it served his argument, when he said "that that rule could be founded on no other law than the statute of *Jac.*" And *Bur-land* Serjt., who was a person of considerable experience, did not deny the rule, but he said "the reason of laying the action in the county where the matter arises is, because they are local actions, and the venue must come from the hundred." In that perhaps he did not satisfactorily answer Mr. *Mansfield's* argument; but what passed there shews on all hands that it was the inveterate opinion that the action must be brought in the proper county. I must repeat that it would have been remarkable if the profession had been going on so long under an error; but on sifting the subject it turns out not to be an error; but that what was done in the two cases cited (b), and what has been considered as the practice in such a variety of other cases, is

(a) 4 Burr. 2467.

(b) *Busterfield v. Windle.* *Robinson v. Garthwaite.*

founded

founded on the statute of *Eliz.*, which is still in full force.

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Judgment of nonsuit (a).

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(a) *Dampier J.* was absent from Serjeants' Inn.

MASTERS against SCROGGES. (a)

Monday,
Jan. 23d.

TRESPASS for entering the plaintiff's house and taking his goods. Plea, justifying under the commissioners of sewers for the limits of *Holborn*, &c. for the non-payment of 1*l.* 10*s.* assessed by the commissioners upon the plaintiff. At the trial before Lord *Ellenborough C. J.* at the *Middlesex* sittings after last *Easter* term, there was a verdict for the plaintiff with nominal damages, subject to the opinion of the Court upon the following case:

The plaintiff's house is situate in the parish of *Hampstead*, above two miles from the boundaries of the city of *London*, but within the division of *Holborn*. The basement story stands 307 feet above the level of the crown of the arch of the great northern sewer at *Battle Bridge*, the stopping of which sewer could not possibly throw back the water so as to injure his premises. The drains from his house and premises go into other drains in the parish of *Hampstead*, which communicate with and fall into the river *Fleet*, and all together fall into the great northern sewer at *Battle Bridge*, and by that sewer are ultimately conveyed into the *Thames* at *Black Friars Bridge*. The river *Fleet*

The Commissioners of sewers cannot assess a person in respect of drains which communicate with other drains that fall into the great sewer, if the level of his drains is so much above the sewer, that the stopping of the sewer could not possibly throw back the water so as to injure his premises, and if he be not, and it does not appear that he is likely to be, benefited by the works done upon the sewer.

(a) This case was argued at Serjeants' Inn.

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which is an ancient watercourse, was formerly uncovered through its whole course to the *Thames*; it has been covered by the commissioners of sewers from the *Thames* as far upwards as *Battle Bridge*, the direction of its course remaining the same or nearly so. The plaintiff has received no additional benefit from the covering of this watercourse, as his waste water would have been equally well carried off if the watercourse had remained open. The case then stated that the plaintiff's premises had never before been rated in this or any other division, and that the rate was duly made if the plaintiff was liable. The question for the opinion of the Court is, whether under these circumstances the plaintiff is liable to be assessed by the said commissioners. If the Court shall think he is not, the verdict is to stand, if otherwise the verdict is to be for the defendant.

Curwood maintained that the plaintiff was not liable, upon the principle that the commissioners are only to assess those who are to receive some benefit, or stand in danger of taking some hurt; but here the plaintiff neither receives the one nor is in danger of the other. That is so stated in the case, notwithstanding that his drains fall into others which communicate with the great outlet. But if that circumstance, which is so remote, were to be alone a ground of charge, it is impossible to say where the jurisdiction of the commissioners would end. *Callis* (a), who says that by the strict penning of the commission, it seems to oppose all exemptions, yet shews by the words of it, which he quotes, that it applies only to those "qui defensionem habere

(a) On Sewers, 176. Ed. 1647.

potuerint

potuerint, seu damnum sustinent vel poterint sustinere."

And he adds, "that the words in our statute are in effect, *And all such which reap profit or sustain damage, shall be assessed;*" and that in his opinion there are some exemptions, though not expressed in words, yet supplied in reason, and are to be added in construction. Then he puts as the first case of exemption, grounds lying betwixt the sea-banks and the seas, *because they can take no safety thereby*; secondly, those grounds which be upon an ascent, and not on the level, are also by the rule of reason exempted from assesses to be imposed by the power of these laws." And as to the liability in respect of the new work of covering the watercourse, *Callis*, 115. puts the case, "if a new wall or bank be erected, or a new sewer or trench be cast, or sluice be built, the commissioners must lay the charge on the level, *which are to take benefit thereby*, as well for new building thereof, as for the maintaining of them." So *Buller J.* in *Dore v. Gray* (a) took the line for the jurisdiction of the commissioners to be this, viz. "where it is stated that the party over whose land the work is done is, or is likely to be benefited: if he be so, that is sufficient to give them jurisdiction." Here all benefit is negatived.

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Abbott, contra, endeavoured to shew that although it was negatived that the plaintiff received any benefit from the covering of the watercourse, or that he could be injured by the stopping of the sewer, yet it must be taken that he received an advantage from the communication with, and from the cleansing and keeping open the sewer, which was done at the expence of the commissioners.

(a) 2 T. R. 358.

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But, *per Curiam*, It ought to appear that the party receives, or is likely to receive a benefit. That is negatived in one respect, and is not shewn in any other.

Per Curiam, (a) Judgment for the Plaintiff.

(a) *Dampier J.* was absent from Serjeants' Inn.

Monday,
Jan. 23d.

MESTAER and Another *qui tam*, &c. against
HERTZ.

Defendant served with a copy of a latitat in a penal action by a wrong name, and declaration filed conditionally by the same name, to which defendant appeared and pleaded a misnomer. Held that a Judge's order to amend the bill and declaration by substituting the true name was good, and that after such amendment there was no irregularity.

THE defendant was served with a copy of an alias latitat in the name of *Moses Isaac Hertz*, in an action of debt for penalties upon the statute of usury, and a declaration was filed conditionally against him by that name, with notice to plead in eight days, and notice of declaration was also in that name. The defendant entered an appearance with the clerk of the common bails, and filed, in person, a plea of misnomer in abatement, that his name was *Maurice Jacob Hertz*. Whereupon a summons was obtained by the plaintiffs for leave to amend the bill and declaration, by substituting the true name. The summons was attended before *Dampier J.* by counsel on both sides, when an order was made to amend the bill and declaration as prayed, upon payment of costs; and the amendment was made accordingly.

Holroyd in the last term obtained a rule nisi for setting aside the proceedings for irregularity, or for discharging the Judge's order. And he cited *Doo v. Butcher* (a), and *Corbett v. Bates* (b), to shew that the

(a) 3 T. R. 611. See also *Delancy v. Cannon*, 10 East, 328.

(b) 3 T. R. 660.

plaintiffs

plaintiffs could not have filed this declaration by the right name because the defendant had not appeared; so neither shall they be at liberty to amend it.

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against
HEATZ.

The Attorney-General and *Marryat* shewed cause and contended that it was a familiar practice after a plea of misnomer to allow the party to amend his declaration; only this being a practice usually conducted at chambers, instances of it were not frequent in the books. And they relied on *Owens v. Dubois* (a), and *Foot v. Prons* (b). Also in *Rex v. Ellames* (c), and *Rex v. Seaxard* (d), an amendment was allowed in a criminal suit. So in *Mad-dock v. Hammet* (e) an amendment was made in a penal action after the time limited for bringing a new action had expired. And per *Holt C. J.* in *Cox v. Wilbraham* (f), if the defendant had pleaded a plea in abatement, it might be reasonable to allow an amendment. The cases of *Doo v. Butcher* and *Corbett v. Bates* only determined that it was an irregularity in the party by his own act to rectify his original mistake in the subsequent proceedings; but it seems that even that is allowed by the practice of the Common Pleas (g). And as to the irregularity, there is none, if the Judge's order be good.

Park and *Holroyd* contra, urged the want of any sufficient precedent for this amendment, and that if it should be allowed, all pleas of misnomer will be set aside. It is true the plaintiffs might have declared by the right name after the defendant appeared (h), but as they have

(a) 7 T. R. 698.

(b) Cited in *Rex v. Ellames*, *Gas. temp. Hardw.* 44. (c) *Ibid.* 42.

(d) 2 Str. 739.

(e) 7 T. R. 55.

(f) *Salk.* 50.(g) *Symmes v. Wason*, 1 Bos. & Pull. 105.(h) *Doo v. Butcher*, 3 T. R. 611.

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MESTARR
against
HARTZ.

not, the defendant's appearance shall not prejudice him; because he was bound to appear in order to plead the misnomer (a), otherwise judgment would have passed against him (b). And now that he has taken advantage of the misnomer by plea, the plaintiffs shall not by afterwards amending save the error, and place the defendant in a worse condition. And here the amendment is in effect to give the plaintiff a new action after the time limited for bringing an action is expired (c). In *Lepara v. Germain* (d), which was a bill against one as Knt., to which he pleaded that he was Knt. and Bart., the Court refused leave to amend, because nothing to amend by, and the defendant had taken advantage of the fault. And so here there was nothing to amend by when the declaration was filed, and the defendant has taken advantage, &c. So in *Bucksom v. Hoskins* (e), per Holt C. J., we cannot put a deceit on the defendant, and make his plea false when it was true. In *Garner v. Anderson* (f) the Court recognized the authority of *Lepara v. Germain*, and upon a difference taken, that there was something to amend by, made the amendment. So in *Owens v. Dubois* the defendant had appeared by his right name before declaration, therefore there was something to amend by; and probably that might be the case in *Foot v. Prons*; and *Symmers v. Wason* has been considered otherwise in *Delanoy v. Cannon* (g). Then if the Judge's order be good, still there is an irregularity, because the order is only for amending the declaration

(a) *Binfield v. Maxwell*, 15 East, 159.

(b) *Oakley v. Giles*, 3 East, 167.

(c) It seemed to be agreed on both sides that the plaintiffs were out of time to bring a fresh action, though it did not appear in the affidavits.

(d) 1 Salk. 50.

(e) Salk. 52.

(f) Str. 11.

(g) 10 East, 328.

and

and not the writ; and the permitting the plaintiffs to amend, only places them in the same situation as if they had declared originally by the right name; but that would have been irregular, and the defendant might have set aside the proceedings at any time. *Dring v. Dickenson.* (a)

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 against
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LORD ELLENBOROUGH C. J. In every case of amendment an advantage is taken from one party which he before possessed; therefore if that were a sufficient ground for refusing this amendment, the Court could not in any instance allow any amendment. The advantage to be obtained is more or less according to different cases; and in the present, it certainly goes to a very important extent; because a refusal to amend will prevent any action at all from being brought. In what situation do these plaintiffs stand? They have described the defendant by a wrong name, having perhaps heard him called by that name once or twice. But that would not be sufficient to maintain an issue upon the misnomer; because whether his name be so or not, depends not upon one or two occasions, but on a plurality of times that he may have been so called. Perhaps they might have doubts upon a matter not lying within their own cognizance, but they venture to call him into court by a particular name. The defendant appears, and being in court pleads a misnomer; and then the plaintiffs, having something given them to amend by, apply for leave to amend, instead of encountering the peril of an issue which probably would have turned out against them, and would have been conclu-

(a) 11 East, 225.

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sive (a). Is this application warranted by precedent? I find by *Rex v. Ellames* Lord *Hardwicke* not at all doubting but that amendments might be made in civil causes, whatever might be the case in criminal suits. And is not this a civil cause? I understand by criminal suit to be meant an indictment or information. This is not the less a civil suit because instituted for the king as well as the subject. Therefore we find this warranted by the prolatum of law as far back as the time of Lord *Hardwicke*; and the doctrine of amendments has been of late more liberal, and practised with greater latitude than formerly. In *Dover v. Mestaer* (b) we find that the party was allowed to amend, and was thus let in to try the merits for which he would have been otherwise too late. That was a penal action, and he would have been shut out of all available cause of action if the amendment had not been allowed. And the present case seems to come within the line which *Lawrence J.* there took as the line which had been drawn in former cases, namely, "that where there has not been any unnecessary delay (and here it does not appear that there has been any) on the part of the plaintiff, in the prosecution of a penal action, the Court will allow an amendment as in other cases, the cause of action being the same." Now here the cause of action is precisely the same, whether the name of the defendant be *Moses Isaac* or *Maurice Jacob*. The Court, in allowing the plaintiffs to amend, make compensation to the defendant by giving him the costs of his plea, and to the plaintiffs they afford an opportunity of not being totally excluded from the merits. Considering the extent to which amendments of this sort have been allowed, the present seems

(a) See *Tidd's Pract.* 648. 5th ed.(b) 4 *East*, 435.

to me to come within the practice, and the principle laid down by Lord *Hardwicke*.

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against
HLEWZ.

LE BLANC J, This is an amendment sought to be made in a civil action. And I think the line has been properly laid down in *Dover v. Mestaer*, that where no time has been lost, so as not to keep a penal action improperly hanging over the head of the defendant, the Court will give leave to amend in this as in other civil actions. Here the party has not been harassed by any improper delay of the plaintiffs. They have sued him, as it appears, by a wrong name: that was a fact, which was not in their knowledge, but peculiarly in that of the defendant. Upon the defendant's appearance by his true name, application is made to amend. I do not see any difference between an application to amend the name and to amend any other part of the declaration. Applications of this sort have been made and allowed, both at chambers and in court, where the amendment went to much more material facts, such as dates or sums for which the action was brought. The next point is, if after this amendment there will not still be an irregularity. It is said the amendment will not cure it; because it will stand the same as if the plaintiffs themselves had made the alteration. But that is not so; because the bill and declaration will be right, and there will be an appearance entered on the record by the right name. It seems to me, that this amendment is warranted by the authorities; and that it will not be subject to the same objection as if the plaintiffs had sued out the writ by a wrong name, and afterwards of themselves declared against him by the right.

Per Curiam, (a)

Rule discharged.

(a) *Dampier J.* was absent from indisposition, and continued absent during the whole term.

1815.

Tuesday,
Jan. 24th.

RIDSDALE and Others against NEWNHAM.

A policy of assurance on freight and goods, per ship named, at and from *Portneuf* to *London*, warranted to sail on or before the 28th of October, and on the 26th the ship dropped down from *Portneuf* with an incomplete crew for the voyage, and on the 28th reached *Quebec*, which was the nearest place where she could obtain a clearance, and there completed her crew, and on the 29th obtained her clearance, and sailed the next day. Held that the dropping down from *Portneuf* to *Quebec* on the 26th was not a compliance with the warranty.

ASSUMPSIT upon a policy of assurance, dated 5th June 1810, upon freight and goods, per ship *Essay*, at and from *Portneuf* to *London*, to return 3 per cent. premium for convoy, warranted to sail on or before the 28th of October. At the trial before Lord *Ellenborough* C. J. at the last *London* sittings, the case was this:

The ship was loaded at *Portneuf*, which lies about 30 miles above *Quebec*, upon the river *St. Lawrence*. There is no custom-house at *Portneuf*, nor can ships clear out at any place higher up the river than *Quebec*. On the 26th of October the ship, under the command of the mate, and with about 30 men on board, some of whom had been engaged in loading her, and the rest were part of her crew, the whole being a sufficient crew for river navigation, though not for the voyage, dropped down from *Portneuf* to *Quebec*, which place she reached in the evening of the 28th. In the mean time the captain had gone thither to get his papers from the custom-house and other offices there, and received his sailing instructions from the commodore there on the 27th. At *Quebec* the ship discharged the extra men, and took in others to complete her crew for the voyage, which then consisted of 19 men, and on the 29th the captain obtained his clearance. On the next day the ship, not being able to get a pilot before, followed the convoy down the river, which had left *Quebec* on the 28th, and came up with it in the course of that day about 30 leagues below *Quebec*, which is very far

within the port of *Quebec*, the limits of the port extending many leagues below *Quebec*. The ship was afterwards captured off the *Isle-of-Wight*.

His Lordship was of opinion that the ship had not sailed in compliance with the warranty, and the plaintiffs were nonsuited. (a)

The Attorney-General moved for a new trial, upon the ground that this being a policy *at and from Portneuf*, it was enough to satisfy the warranty that the ship broke ground from *Portneuf* on or before the particular day. It was not a warranty to sail from *Quebec* on or before the day; and therefore if there was a beginning to sail from *Portneuf*, in the usual way of sailing from that place, on or before the day, the warranty would be satisfied, although the ship's clearances were not obtained until a day after, because it appears she could not obtain them before her arrival at *Quebec*. And he put the case of a policy at and from a particular place with a warranty to sail on a particular day in company with a first-rate man of war; would it not be a compliance with such warranty, if the ship sailed on the day and joined company with a first-rate man of war at the first place that a man of war of that description could ride, although that might be after the day? If it would, that shews that a compliance with the warranty, according to the natural and usual means that the assured has of complying with it, is sufficient; and therefore, in this case, the sailing from *Portneuf* before the particular day, and procuring the clearances at the

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(a) See 4 Camp. N. P. C. 111.

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first place the ship was able to procure them, though after the day, is well enough.

LORD ELLENBOROUGH C. J. I thought the warranty contemplated a sailing upon the voyage, and that the ship's dropping down from *Portneuf* to *Quebec* without her complement of men, shewed that that was only preparatory to the voyage. The policy being, at and from, there is no doubt it attached at *Portneuf*, but according to the reason of the thing the policy must be taken distributive, and "warranted to sail on such a day" must mean to sail on her voyage, that is, when the ship could get her clearances and sail equipt for the voyage.

LE BLANC J. Does not the warranty amount to this, that the ship shall sail on or before the day upon her voyage?

BAYLEY J. Although the policy attached at and from *Portneuf*, yet when the 28th expired without her sailing in compliance with the warranty, there was an end of the policy quoad the voyage.

Rule refused.

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The KING *against* the Justices of HERTFORD-
SHIRE.

Tuesday,
Jan. 24th.

TWO justices, at a special sessions on the 20th of *June* made an order, by which they ordered a public footway to be diverted and turned; and upon the 4th of *July* following made another order, by which they ordered the old footway to be stopped up. Appeal against these orders was made at the next *Michaelmas* quarter sessions, and not at the *Midsummer* quarter sessions, which were holden on the 11th of *July*, on which account the justices dismissed the appeal. And now, upon a rule nisi for a mandamus to the justices to enter continuances to their next quarter sessions, &c., the question was if the appeal was made in time.

If two justices make an order for diverting and turning a public footway, and afterwards an order for stopping up the old footway, the party grieved may appeal to the quarter sessions against the last order, though he be too late to appeal against the first.

Trollope, who shewed cause, contended that that question depended upon whether the time for appealing was to be reckoned from the date of the first or the second order. If from the first, the party ought to have appealed to the *Midsummer* sessions; if from the second, he admitted there was not sufficient time to give the ten days notice required by the statute (a). And he argued that the time ought to be reckoned from the first order, because the first order comprehended every thing which was contained in the second, and therefore the second was perfectly unnecessary, and the justices, after making the first, were functi officio. And that, he said, would appear by a reference to the

(a) 13 G. 3. c. 78. s. 19.

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The KING
against
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SHIRE.

19th section of stat. 13 G. 3. c. 78., where the order for diverting, turning, and stopping up a *public footway* is treated as all one, and an appeal is given to the party grieved against such order. And yet the form of such order, as given in the schedule No. 21. is only “that it be diverted and turned,” as in this case. And it farther appears that in the case of a *highway*, where the legislature intended that the order for diverting and turning should be distinct from that for stopping up, separate enactments are made in the 16 and 17th sections for each of those several purposes, and there are also distinct forms in the schedule, Nos. 16 and 18., applicable to each. From which it is plain that if the stopping up a footway were not meant to be virtually included in the order for diverting and turning, there would also have been a separate enactment and form applicable to that. Wherefore he concluded that the time for appealing should be from the first order.

Hullock and *Bourchier*, contra, denied that the order for diverting and turning included the stopping up, for so long as there is only an order for diverting and turning, the public have a right to go along the old footway; and here the justices have made a separate order for the stopping up, and the 19th section expressly gives an appeal, where any footway shall be ordered to be stopped up; so that if the appeal be out of time for the first order, it is good for the second.

And, *per Curiam*, The gravamen as to the public is the stopping up, but the appeal must be confined to the latter order.

Rule absolute as to the appeal against
the order for stopping up.

1815.

Moir *against* the ROYAL EXCHANGE Assurance
Company.

Wednesday,
Jan. 25th.

DEBT upon a policy of assurance, dated 19th September 1811, on the ship *Neptune*, lost or not lost, at and from *Memel* to the ship's port of discharge in *England*, free of capture and seizure and the consequences of any attempt thereof in the port and roads of loading, warranted 'to depart on or before the 15th of September then instant, N. S.' Loss by perils of the seas. At the trial before Lord *Ellenborough* C. J. at the last *London* sittings, the case, as it appeared upon admissions, was this:

The ship having completed her loading at *Memel*, obtained her clearances on the 9th of September 1811, at the custom-house there, and sailed on her voyage; but before she got out of the harbour of *Memel* the wind changed, and continuing adverse, she was obliged to come to an anchor, and was detained until after the 15th of September within the harbour's mouth. She afterwards sailed and was lost. And the question was, whether the warranty to depart on or before the 15th of September had been complied with: in support of which, *Bond v. Nutt* (a), *Thelusson v. Ferguson* (b), and *Wright v. Shiffner* (c) were cited. But his Lordship took a distinction between a warranty to sail, and a warranty to depart, viz. that the latter meant that the ship should be out of the port; and thereupon he directed a nonsuit. (d)

Policy of assurance on ship at and from *Memel* to the ship's port of discharge in *England*, warranted to depart on or before a particular day. Held that this warranty required not only that the ship should set sail on the voyage, but that she should be out of the port on or before the day; and therefore where she set sail on the voyage before the day, but was detained within the harbour by adverse winds until after the day, this was not a compliance with the warranty.

(a) *Cowp.* 601.(b) *Doug.* 346.(c) 11 *East*, 515. 2 *Campb. N. P. C.* 247.(d) See 4 *Campb. N. P. C.* 84.

Topping

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Topping moved to set aside the nonsuit, and contended that the word *depart* differed in no respect from the word *sail*; and if so, when the ship once broke ground upon her voyage, there was a beginning to depart; and the interruption would not alter the case, because the warranty had already been complied with. And he said, if the words had been *depart from*, that would have made it more susceptible of the construction adopted at the trial, than it now is, because that might have implied that the ship should quit the port. But a ship may fairly be said to depart the moment she sets sail upon her voyage.

LORD ELLENBOROUGH C. J. I was of opinion at the trial that there was enough to bring the case within the authorities cited, if this had been a warranty to *sail*. There was a sailing abundantly proved. But to *depart* raises a question of grammatical construction. A warranty to depart on or before a particular day, is I think a warranty to be out of the port on or before that day. The object seems to be, that the voyage should be commenced out of the port by that time. The language of the underwriter amounts to this: "I will be answerable for all perils upon the high seas, but let the vessel be well out of *Mcmel* by the 15th of *September*."

LE BLANC J. The argument is, that to depart is no more than to break ground upon the voyage; but I do not know how to construe a warranty to depart otherwise than as a warranty to depart from the port.

BAYLEY

BAYLEY J. By substituting the word depart for sail, it seems to have been intended to vary the risk.

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Rule refused.

MOIR
against
the ROYAL
EXCHANGE
Assurance
Company.

GIBSON *against* DICKIE.

Wednesday,
Jan. 25th.

ASSUMPSIT for the arrears of an annuity. The plaintiff declares in the first count, that at the time of making the promise, &c. she lived and cohabited and for a long space of time had lived and cohabited with the defendant, and that before the making the promise the defendant had received of her 108*l.* bank stock, and 100*l.* sterling, and that certain differences had arisen between them; whereupon the defendant agreed, in case the plaintiff and defendant should separate, that he, the defendant, would pay to one J. S. for the plaintiff's use the value of the 108*l.* bank stock and 100*l.* sterling, deducting the value of 100*l.* 3 per cent. consolid. bank annuities, *and would allow the plaintiff 3*l.* per ann. during her life, by quarterly payments, provided the plaintiff, from and after such separation, should continue single, and did not cohabit with one D. G. or any one else.* And the plaintiff avers that she and the defendant did separate, &c. and that from the time of such separation she hath continued single, and hath not cohabited with the said D. G. or any one else, and that 67*l.* 10*s.*, for two years and a quarter's arrears of the said annuity, became due, which the defendant refused to pay, &c. Plea non assumpsit. A verdict having been found for the

An agreement by defendant to allow plaintiff, with whom he cohabited, in case they should separate, an annuity for her life, provided she should continue single, was held a valid agreement.

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the plaintiff, it was moved by *Heath*, in arrest of judgment, that the agreement set forth in the declaration was void; first, because the allowance of the annuity in case of separation was by way of inducement to the plaintiff to continue the illicit cohabitation; 2dly, because the annuity was only to continue provided the plaintiff should remain single, &c. which was therefore in restraint of marriage. And he compared it to the case of *Lowe v. Peers* (a), where an agreement by the defendant not to marry any other person than the plaintiff, or to forfeit 1000*l.*, was adjudged ill.

But, *per Curiam*, the agreement is well enough; for this was no more than a gift to the plaintiff upon condition that she should live sole and chaste, which is a condition in daily use in provisions made for a wife during her widowhood. It was not like the case cited of a forfeiture to be incurred by the party in case he married, but was an original gift with a condition annexed; and *cujus est dare ejus est disponere*; it was a voluntary compensation by way of maintenance made to the plaintiff for the injury done her by their past illicit connection, but it is qualified with a condition that if she should marry, and thereby acquire for herself a maintenance, it should cease. And as to the first objection, they said, that so far from its being an inducement to her to continue the cohabitation, it was rather an inducement to separate.

Rule refused.

(a) 4 Burr. 2225.

1815.

The KING, on the Prosecution of KIMBERLEY
and five others, *against* The Inhabitants of
TAUNTON ST. MARY.

Thursday,
Jan. 26th.

INDICTMENT for not repairing a highway lying within the parish of *Taunton St. Mary*, which was found at the quarter sessions, and removed by certiorari into this court at the instance of the defendants, upon the usual affidavit (*a*), and tried at the summer assizes for *Somersetshire*, 1813, when the defendants were convicted, by consent, upon the counts for a horse and foot-way, and acquitted upon those for a carriage-way. Upon a rule nisi for paying over 156*l.* 2*s.* 3*d.*, being the taxed costs, to the prosecutors, the question was, whether they were entitled under stat. 5 *W. & M. c. 11. s. 3.*, which gives "reasonable costs to the prosecutor if he be the party grieved, or be a justice of the peace, &c., constable, &c. or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him as officer to prosecute or present." *Kimberley* claimed as constable, and the others as parties grieved. As to *Kimberley*, it appeared that he, together with the other prosecutors, presented the bill against the road in question to the grand jury at the sessions. At that time *Kimberley* was constable for the manor of *Taunton Dean*, which manor comprizes as well the parish of *Taunton St. Mary* as 12 other parishes, and has two constables, who are appointed annually for the manor, one at a court leet in *April*, and the other at a

Several persons were held entitled to costs under stat. 5 *W. & M. c. 11.* as prosecutors of an indictment, removed by certiorari, for not repairing a highway, one as constable of the manor within which the highway lay, the others as parties grieved, they having used the way for many years in passing and repassing from their homes to the next market-town, and being obliged, by reason of the want of repair, to take a more circuitous route.

Upon indictment against a parish for not repairing a highway, the right to repair may come in question, so as to entitle the parish to remove it by certiorari, though the parish plead not guilty only.

(a) See 5 *W. & M. c. 11. s. 6.* 13 *G. 3. c. 78. s. 24.*

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court leet in *October*. The usage has been for the constable chosen at the *April* leet to act only within a certain district of the manor which comprizes seven of the parishes, one of those parishes being *Taunton St. Mary*, and for the constable chosen at the *October* leet to act within the remaining district; but both are chosen and sworn for the whole manor generally, without any specification of districts. *Kimberley* was appointed constable at the *October* leet 1811, but, as it was sworn by the deputy steward, was authorized and compellable to act, if required, over the whole manor, notwithstanding the above division of duties, and was directed by the said deputy steward to view the road in question, and present the same if out of repair; and he did accordingly view and present the same as above stated. As to the other prosecutors, they appeared to be persons living in the neighbourhood and in the constant habit of using the way for many years before it became foundrous, in passing to and from *Taunton* their nearest market town, and that since, they had been compelled to take a less commodious and more circuitous route thither by half a mile and upwards.

Pell Serjt., Moore, and Horner, who shewed cause, submitted that the prosecutors were not entitled to costs; and they grounded their argument upon the opinion of *Buller J.* in *Rex v. Sharpness (a)*, that the statute 5 *W. & M.* had always been construed as strictly as possible. And upon that they argued that the 3d section did not apply to this case, because it speaks only of prosecutions on account of any fact committed or done,

(a) 2 *T. R.* 42.

whereas

whereas this prosecution is for a fact omitted, not committed, for it cannot with any grammatical accuracy be said that a parish has committed the fact of omitting to repair. Also the 3d section, by the words "such writ of certiorari," seems to be confined to such presentments and indictments as are mentioned in the preceding sections, which do not comprize indictments or presentments for not repairing highways, but they are provided for in the 6th section, which is silent as to costs. And it appears by stat. 13 G. 3. c. 78. s. 64. that the awarding of costs upon indictments or presentments for not repairing highways is given to the Court before whom the same are tried, wherever the same shall appear frivolous, which would have been nugatory in all cases of certiorari, if the 5 W. & M. c. 11. s. 3. already gave costs to the party grieved. At all events, *Kimberley* is not entitled, because this was not a fact which concerned him as officer to prosecute, for it does not concern a constable to present highways; as appears from stat. 13 G. 3. c. 78. s. 24. which empowers justices of the peace to make presentments, and the sessions in relief of the justice to order the prosecution to be carried on at the public expence, but makes no mention of constables; whence it is plain, that the statute did not intend that a constable should present, otherwise it would have named and extended the same relief to him. And granting that a constable may present, yet *Kimberley* is not the proper constable in this instance, because the highway does not lie within his district, but within the district of his fellow-constable; and by the usage each constable acts within his own district only, though he is appointed for the manor; and usage in the case of a manor-constable, who is not appointed by the common law, but by custom, is

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the best interpreter of what his jurisdiction is. Then as to his being the prosecutor of the indictment before the grand jury, *Rex v. Kettleworth* (a) shews that he must be an officer whom it concerned to prosecute as well as prosecutor, before he is entitled to costs under the stat. *W. & M.* With respect to the other prosecutors, it does not appear that theirs is any thing more than the common grievance, viz. that they must either pass over a foundrous way or go another. But that was clearly laid down by Lord *Ellenborough* C. J. in *Rex v. Inledon* (b) to be insufficient to constitute any one a party grieved. In *Rex v. Williamson* (c) there was something more, for there the prosecutor had used the way for some years before the stopping up. Another objection is, that a certiorari was not grantable in this case, because by stat. 22 *Car. 2. c. 12. s. 4.* the removal of indictments for not repairing highways is prohibited before traverse and judgment given thereon, and the stat. 5 *W. & M. c. 11. s. 6.* relaxes that prohibition in such cases only where the right or title to repair may come in question. But that could not come in question in this case, because by pleading not guilty only the parish have admitted their liability; if they had meant to deny it, they should have pleaded specially that others were bound to repair.

Lens Serjt. and *C. F. Williams*, contra, contended that the construction put upon the word "*committed*," in the statute of *W. & M.* was too critical, and that it was more reasonable to construe it to mean any offence (which word occurs in the same section) committed as well by a negative as positive breach of

(a) 5 *T. R.* 35.(b) *Ante*, vol. i. 271.(c) 7 *T. R.* 32.

duty,

duty, which is within the same mischief. And as to the stat. 13 G. 3. c. 78. s. 64. they said it was passed diverso intuitu, viz. to empower the Court before whom the indictment is tried to give costs, where either the prosecution or defence shall appear to be frivolous; which may well stand with this provision in the statute of *W. & M.* for costs to be paid by the defendant upon a certiorari. Then as to *Kimberley*, supposing he had not a general authority as constable to present, still it appears that in this instance he was specially appointed to do so, for being chosen and sworn and compellable to act for the whole manor, he was directed to view and present the road, and he did so; therefore he was strictly in the execution of his duty. And so this case is not within the authority of *Rex v. Sharpness*, because that turned upon the distinction, that it was not the duty of the prosecutor as a justice to prosecute, but that he prosecuted like any other individual. And what *Buller J.* said as to the construction of the stat. *W. & M.* must be taken with reference to that distinction, namely, that the statute shall not be construed to make acts done by the justice in his natural capacity, as if done by him in his judicial capacity; but he cited a case from *Basingstoke* where the clerk of the peace, who carried on the prosecution, had been allowed costs, because it was his duty to draw up presentments of constables. Thus it appears that he did not mean that the statute should in all cases be construed strictly, and Lord *Kenyon*, in *Rex v. Kettleworth*, has laid down a different rule, which is the more reasonable. As to the other prosecutors, it will be found that every circumstance of peculiar grievance belongs to them which belonged to the prosecutor in *Rex v.*

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Williamson, and those circumstances were held sufficient to constitute him a party grieved. And the answer to the last objection is, that the right or title to repair might come in question in this case, and that is proved by the fact, for the defence at the trial was, that non user was a destruction of the right; but that was over-ruled.

LORD ELLENBOROUGH C. J. As to the right to remove this indictment by certiorari, there certainly is, under the statute of *W. & M.*, which I take to be a repeal of the statute of *Car. 2.*, a right to remove by certiorari, where the title to repair may come in question. And as far as these defendants could do it they have availed themselves of that right, by making the proper affidavit upon which a certiorari in these cases is usually granted; but if there could be no case where a certiorari would lie upon an indictment against a parish for not repairing, I do not say that such an affidavit would give the Court jurisdiction. But in all cases, as it seems to me, though the indictment be against a parish, and they plead not guilty, yet the right to repair comes incidentally in question, inasmuch as the obligation to repair arises out of the question whether it be a public highway. It is a first step to the determining whether it be a public highway, and whether that character belongs to it or not, to make inquiry as to the right to repair it. It appears to me, therefore, that in point of law, as well as upon the fact sworn to by the parties, this is an indictment upon which the right or title to repair may come in question. If this be so, the statute of *W. & M.* has in this respect repealed the statute of *Car. 2.* Then the question is, whether these prosecutors are entitled to costs, some of them as being clothed with the character

of parties grieved, and the other as an officer prosecuting on account of a fact that concerned him to prosecute and present. As to the latter it is objected that by a certain partition of duty between the two constables of this manor, which has existed by immemorial custom, one of them has superintended one district, the other the other, and that this highway is without the district of the presenting constable. But the answer to that is, that the manor comprehends the whole, and the duties of each are co-extensive with the whole, though for purposes of convenience they may be in the habit of partitioning their duties. If there was any neglect of duty in any part, it would be no lawful excuse for either to say, we have partitioned our duty, and the neglect arises in my colleague's district, and not in mine; the answer would be, you are not the less constable over the whole manor, because you have a co-constable associated with you. It appears then that he is certainly to be considered as an officer whom it might concern to prosecute. But it is said that he must be an officer whom it concerns to prosecute for a fact committed or done, and that this is a prosecution for a non-feazance only, not a mis-feazance. But I think that is an argument drawn from construing the words of the statute too nicely and critically. The statute, by the words "any fact committed or done," means any matter, *si quid acciderit*, not any affirmative fact exclusively. In like manner, as it has been observed by my Brother *Lens*, the word offence is used in the same section, not in its affirmative and original sense only, as derived from *offendo*, to strike against, but in a sense which comprehends offences of non-feazance also. Therefore the statute includes an officer prosecuting for an offence of non-feazance, such as it concerns him

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to prosecute. And here it does concern his duty to see that a place of public transit is open to the public, and kept in repair; lest the public, if it should become foundrous, should have to pass along a more circuitous way. Then we come to the question, whether the rest of these prosecutors be parties grieved. Certainly a person does not answer to the character of a party grieved, who is only in common with the rest of the subjects inconvenienced by the nuisance; but here it appears that these persons have, by reason of their local situation, a peculiar grievance of their own. For living in the neighbourhood, and having been in the constant habit of passing to and fro on this highway, they have been obliged to abandon it, and take a more circuitous route, in their transit to and from the nearest market town and their habitations, which is a peculiar personal grievance beyond that which affects the public at large. So that here it appears is a constable who prosecuted on account of a fact committed, which it concerned him to prosecute, and there are parties grieved within the meaning of this act of parliament. As to the question whether the act is to be construed strictly, in conformity with what was said by *Buller J.* or as a remedial law, according to the opinion of Lord *Kenyon* in *Ret v. Kettleworth*, if it be necessary to put those authorities in competition with each other, I cannot help inclining rather to the reasoning and understanding of the statute adopted by Lord *Kenyon*. It is extremely beneficial to the public that these laws should be enforced, and that the subjects should be encouraged in enforcing them whenever they fairly bring themselves within the description in the statute of an officer or party grieved, by obtaining an indemnity from the costs.

costs. I therefore think this is a case where the indictment might be removed, and where the parties are intitled to costs.

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LE BLANC J. This was an indictment found at the quarter sessions against the inhabitants of the parish of *Taunton St. Mary* for not repairing a highway, which was removed by certiorari by the defendants, upon an affidavit filed by them, stating that on the trial of the indictment, the question whether the parish were liable to repair, and the right to repair, would come in issue. Upon this statement simply I should think it sufficient to say that the defendants could not now insist that this is a case in which the indictment ought not to have been removed. But there is another answer to any such objection, namely, that in every case of an indictment against a parish for not repairing a highway, although the general issue only be pleaded, the inquiry whether it be a public or private way necessarily brings into question whether the parish be liable or not to repair, because if it be a public way, the parish will be liable; if private, they will not. In this way it may fairly be said upon the general issue to be a question in which the right to repair may come in question. Then the question is, whether assuming that the defendants had a right to remove this indictment by certiorari, the prosecutors are entitled to costs. One of them it appears is a constable of the manor of *Taunton Dean*, who is sworn in for the whole manor generally, though for convenience sake the two constables are in the habit of dividing their duties, and acting only within certain districts. Part of their duty is to look to the repairs of the highways within the manor, and this prosecutor, it appears,

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was directed by the steward to take the proper measures for presenting the road, if upon his view it should be deemed out of repair. That part of the case therefore falls within the statute of *W. & M.*, it appearing that the constable was an officer within whose duty it was to prosecute, and that he prosecuted on account of a fact committed or done. But that will come farther under consideration presently. The other prosecutors are parties living in the neighbourhood, and their road lies over this highway to their nearest market-town, and all state by affidavit, that in consequence of its being out of repair they are obliged to go a more circuitous way by half a mile in order to reach the market-town. And the question is, whether these persons are not entitled to costs as parties grieved; which brings it to a question upon the 3d section of the stat. 5 *W. & M.* That section provides " that if the defendant prosecuting the certiorari be convicted of the offence, the Court shall give reasonable costs to the prosecutor, if he be the party grieved, or be a justice of the peace, mayor, bailiff, constable, &c. or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him as officer to prosecute." Now as to this not being a prosecution on account of a fact done, it is observable that according to the words of this clause the person who prosecutes, as a justice of the peace, constable, or other officer, as well as those who prosecute as parties grieved, are all placed under the head of persons who prosecute on account of any fact committed or done. Therefore, as far as respects the nature of the offence prosecuted, every authority which shews that a justice of the peace or officer is entitled to costs, is likewise an authority to shew that the parties grieved will be so entitled. *Ashhurst J.* considered, in *Rex v. Sharpness*, that a justice

justice of the peace, who by virtue of his authority presents a road upon view, would be entitled to costs. He says, "if a justice of the peace were to present a road, and that presentment were afterwards turned into an indictment, the justice would be entitled to costs." He therefore considered that a justice would be entitled to costs, if he were to present a road out of repair. But the justice could only be so entitled as a person who prosecuted for a fact committed or done. So in *Rex v. Kettleworth* it was held that a justice of the peace who indicted a road out of repair was entitled to costs as being within the statute; and yet in no respect was that an indictment on account of a fact committed or done, any more than in this case; it was merely for a non-repair. And the words of the statute being just the same, whether it be a justice of the peace or a party grieved who prosecutes, it follows from this that a party grieved would be equally entitled upon such an indictment. Then do these persons stand in the situation of parties grieved, or only as part of the public. If they are to be deemed merely a part of the public, they will not come within the description of parties grieved; but it appears that they are persons whose occasions have required them to pass continually to and fro upon this highway for a great length of time, and that they have been obliged, in consequence of the want of reparation, to go half a mile farther about. They are therefore peculiarly inconvenienced, and the Court has determined in other cases, that where a road is stopped up by which persons who were in the habit of using it are prevented from using it, and obliged to go round, such persons are parties aggrieved. What difference does it make, whether a person is prevented from going along the road by

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a tree being laid across it, or by its being suffered to be out of repair through negligence? It is to him equally a peculiar grievance. With respect to the clause in the 13 Geo. 3. which empowers the Court before whom the indictment is tried to give costs, that is only in cases which are totally out of the purview of this act. That clause was framed with a view of enabling the Court before which the indictment was tried to allow costs, whether that was the court of sessions or any other court; it has nothing to do with costs upon a certiorari. It appears to me therefore that the prosecutors in this case are well entitled to their costs; one as constable within whose province it was to prosecute, the others as parties grieved who prosecute for an act committed or done; inasmuch as the cases relating to prosecutions by justices of the peace, &c. could only have been determined as they have been, upon this construction, that an indictment for the non-repair of a road was an indictment on account of a fact committed or done.

BAYLEY J. I am entirely of the same opinion. It would be useless and a waste of time to go over the same ground, where it has been so fully gone into by my Lord and my Brother *Le Blanc*. I shall therefore only notice one particular, namely, what has been insisted upon in respect of the words, "such writ of certiorari," in the 3d section of the stat. *W. & M.* It has been said that they apply only to such cases of certiorari as are mentioned in the preceding section; and that in the preceding section a certiorari to remove an indictment for not repairing a highway is not mentioned, but that is provided for afterwards. But it must be observed, it

answered

answer to this, that the words in the 2d section are general; the whole act is one entire act passed at one and the same time; and such certiorari may mean any certiorari.

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DEBT on bond. Upon oyer of the bond and condition, which was a joint and several bond by the two defendants in the penal sum of 100*l.*, conditioned for the payment of 50*l.*, with interest, &c., *M. Dineley* pleads non est factum. *J. Dineley* pleads that at the time of making the said writing obligatory he was an infant within the age of 21. Replication, that *J. D.*, after the making of the said writing obligatory, and before the commencement of this suit, to wit, on, &c., attained his age of 21, and afterwards, and before the commencement of this suit, to wit, on, &c. assented to and ratified and confirmed the said writing obligatory. Demurrer, assigning for cause, that it is not alleged in the replication that *J. D.*, after he attained his age of 21, resealed the said writing obligatory, or re-delivered the same as his act and deed, and that it is not set forth in the replication in what manner or by what means *J. D.* is supposed to have ratified and confirmed the said writing obligatory, and also that the plaintiff hath not made profert of any deed or writing whereby the said writing obligatory is supposed to have been ratified and confirmed, &c.

Debt on bond with a penalty; plea infancy; replication, that after the making of the bond and before commencement of the suit he attained his full age, and afterwards, and before the suit, assented to and ratified and confirmed the bond: Upon special demurrer, held that the replication was ill, for an infant cannot give a bond with a penalty for the payment of interest; and unless he be estopped by some act at full age of as high authority as the bond, he shall avoid it.

Campbell, in support of the demurrer, argued that the replication was primæ impressionis, being without
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a precedent in any book of entries or pleadings. It was also ill both in substance and form; in substance, because this bond, being void ab origine, cannot be ratified in any way; in form, because if it could be ratified, it should have been shewn in what way the defendant ratified it. That the bond of an infant, if it be with a penalty, is void, appears from many authorities, viz. *Com. Dig. Infant*, C. 2. *Bac. Abr. Infancy*, I. 1. *Bull. N. P.* 182. *Ayliff v. Archdale* (a), and *Delavel v. Clare* (b). Then if this bond was originally void, it follows that it cannot be made good by confirmation, because confirmation implies the existence of the particular thing to be confirmed. And it seems from *Edmunds v. Burton* (c), that a promise after full age to pay a bond given during nonage was held good to maintain *assumpsit*, which shews that the bond was not ratified by the promise; and though it was there said that the bond was not void, but voidable, it appears to have been intended by that, not that the bond was not ipso facto void, but only that it could not be avoided upon non est factum or nil debet. And to the same end the language of the Court in *Thompson v. Leach* (d) is extremely strong, for the Court put the grants of infants, and persons non compos, as parallel, and that a surrender or grant of a rent charge by an infant, is not voidable, but ipso facto void. And then they add, that "In all the cases cited, where it is held that the deeds of infants are not void but voidable, the meaning is, that non est factum cannot be pleaded, because they have the form though not the operation of deeds, &c.

(a) *Cro. Eliz.* 920.(b) *Noy*, 85.(c) Cited in *Stone v. Wyllipol*, *Cro. Eliz.* 127.(d) 3 *Mod.* 310.

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Therefore," say the Court, "if an infant make a letter of attorney, though it be void in itself, yet it shall not be avoided by pleading non est factum, but by shewing infancy." So bonds given upon an usurious, simoniacal, or gaming consideration, which are ipso facto void by the statute, must nevertheless be avoided by pleading, and in that sense may be said to be voidable. This expression, therefore, thus explained,* is not at variance with the argument that this bond was originally void, which by the above authorities it is shewn to be, and so cannot be ratified; wherefore the replication is ill in substance. It is true that a replication like the present has been sustained in assumption; but that was upon a distinct ground, viz. because the words *ratified and confirmed* imported a new promise (a). And in *Thrupp v. Fielder* (b), Lord *Kenyon* said, that he should require evidence of an express promise after full age. But here neither a new promise nor a new delivery would make this bond good which was originally void. 2dly, The replication is ill in point of form, because it tenders no fact in issue, but only matter of law, for whether or not the defendant ratified and confirmed the bond is a mere conclusion of law to be drawn from the circumstances; the circumstances, therefore, ought to have been set forth in the replication.

Abbott, contra, agreed that if the bond was originally void, it could not be made good by confirmation. But he took this distinction, that if a deed be made by a feme covert it is merely void, but if by an infant it is

(a) *Cohen v. Armstrong*, ante, vol. i. 725. (b) 2 *Esp. N. P. C.* 628.

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voidable only; and in some cases it is not even voidable by an infant, as if he give a single bond for necessities (a); aliter if it be with a penalty, for then in the language of *Litt. s. 259.*, it serves for nothing, and may be avoided; c., as Lord Coke expresses it, the obligation shall not bind him (b). Granting then that this bond, by reason that it is with a penalty, did not bind the defendant, but that he might avoid it, it follows that he might also confirm it, because that which is void only at the election of the party, may, if he does not elect to avoid it, be made good. In *Tapper v. Davenant* (c), a promise at full age upon the same contract for which an obligation was given during infancy was held without consideration, for the obligation was only voidable and extinguished the contract. So in *Ashfield v. Ashfield* (d), it was resolved that if an infant make a lease for years rendering rent, it is only voidable, and if he accept rent at full age, he cannot afterwards avoid it; which resolution was afterwards affirmed on error. So if an infant continue in possession, after his full age, of lands leased to him during his infancy, he affirms the lease, and shall be liable to the arrears of rent incurred before (e). Then if this obligation be capable of being affirmed in any way, the replication is well enough in form, because it must be taken upon demurrer that it was affirmed in the way it might lawfully be, and the Court cannot decide against the replication without holding that in no possible way can

(a) *Russel v. Lee*, 1 *Lev.* 86.(b) *Co. Litt.* 172. a.(c) 3 *Keb.* 798. S. C. *Bull. N. P.* 155., where it appears to have been a single bond, and supposing a chariot and horses to have been necessities, would not have been voidable.(d) *Sir W. Jones*, 157.(e) 1 *Roll. Abr. Enfants*, (K). *Cra. F.* 310. 2 *Buls.* 69.

an infant, after full age, affirm such an obligation as the present.

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Lord ELLENBOROUGH C. J. In the case cited of the infant lessee it was equivocal in the constitution of that estate whether it was not for his benefit; a possession was given him, and a right to the estate, therefore it was equivocal whether it might not be for his benefit; and then he continues after full age, and adopts it. In the case of the infant lessor, that being a lease rendering rent, imported on the face of it a benefit to the infant, and his accepting the rent at full age was conclusive that it was for his benefit. But how do these authorities affect a case like the present, where it is clear upon the face of the instrument that it is to the prejudice of the infant, for it is an obligation with a penalty and for the payment of interest? Is there any authority to shew, that if upon looking to the instrument the Court can clearly pronounce that it is to the infant's prejudice, they will nevertheless suffer it to be set up by matter ex post facto after full age? In *Keane v. Boycot* (a) I find it laid down by *Eyre* C. J. that "some contracts of infants are merely void, namely, such as the Court can pronounce to be to their prejudice." And in *Fisher v. Mowbray* (b) it was decided, that if an infant give a bond conditioned for the payment of interest, it avoids the whole security, for an infant cannot give a security for the payment of interest. In *Zouch v. Parsons* (c), where this subject was much considered, I find nothing which tends to shew that an infant may bind himself to his prejudice. It is the privilege of the

(a) 2 H. Bl. 515.

(b) 8 East, 330.

(c) 3 Burr. 1794.

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infant that he shall not, and we should be breaking down the protection which the law has cast around him, if we were to give effect to a confirmation by parol of a deed like this made by him during infancy. Unless there be something amounting to an estoppel in law of as high authority as the deed itself, we cannot surrender the interests of the infant into such hands as he may chance to get. It appears to me that we should be doing so in this case, unless we required the act after full age to be of as great solemnity as the original instrument.

BAYLEY J. In *Co. Lit.* 172. a. the distinction is taken, that "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him."

Per Curiam,

Judgment for the Defendant.

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PLUMMER and Others *against* WILDMAN.

Where a ship in the course of her voyage was run foul of by another ship and damaged, and the captain

ASSUMPSIT for contribution to a general average, for work and labour, and for money paid. Plea, general issue. At the trial before Lord *Ellenborough* was in consequence obliged to cut away part of the rigging and to return to port to repair the damage and cutting away, without which the ship could not have prosecuted her voyage, or safely kept the sea: Held that the expences of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage; but no further, and of unloading the goods for the purpose of making the repairs, were a general average. Secus the master's expences during the unloading, repairing, and reloading, and crimpage to replace deserters during the repairs.

C. J. at the *London* sittings after *Trinity* term 1811, a verdict was found for the plaintiffs, subject to the opinion of the Court upon a case, the material facts of which are as follow :

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The ship *Cambridge*, of which the plaintiffs were the owners, sailed on the 26th of *April* from *Kingston* in *Jamaica*, where she was loaded, with a cargo for *London*, consisting of sugars and rum, a part of which belonged and was consigned to the defendant by bill of lading deliverable to him in *London*, he paying freight with prime and average accustomed. A day or two after the ship sailed, and while she was in the prosecution of her voyage, she was run foul of by a brig, which was unavoidably driven against her by the violence of the wind and weather, by which accident her false stern and knees were broken, and the master was in consequence obliged to cut away part of the rigging of her bowsprit, and to return to *Kingston* to repair the damage sustained by the accident and the cutting away. The ship could not have prosecuted her voyage, nor could she have kept the sea with safety, without returning and repairing. Upon her return the cargo was necessarily relanded and warehoused, in order that such temporary repairs might be done as would enable her to prosecute her voyage, and the master, towards defraying the expences, sold 12 hogsheads 3 tierces of sugar, and two puncheons of rum, one of which was part of the defendant's consignment, and was sold for 15*l*. When the repairs were finished, the remainder of the cargo was reloaded, and the ship proceeded to *London*, and delivered it to the defendant and the other consignees. After the ship's arrival in *London* she underwent a more effectual repair of the damage, the expence of which the

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plaintiffs did not include in their claim for contribution, but they claimed in respect of the sums disbursed by them at *Jamaica* in consequence of the accident. The particulars of the disbursements in respect of which the plaintiffs claimed, contained, amongst others, disbursements for pilotage into *Kingston* on the ship's return; for surveying and ascertaining the damage, and repairing the same, smith's and carpenter's work, and for materials; for wharfage and cooperage on landing and stowing the goods during the repairs; for reloading; for the master's expences 5 dollars per diem during the unloading, repairing, and reloading; for crimpage to replace deserters during the repairs, &c. And the question made was, whether this was a case of general average; and if it were, to what extent, it being agreed that when the Court should pronounce the rule, if they should be of opinion that the defendant was liable to any part, the amount should be settled by arbitration. If the defendant was not liable beyond 15*l.*, for which his puncheon of rum was sold, a nonsuit to be entered.

Marryat for the plaintiffs, upon the question whether this was a case of general average, contended that it was; and he took the rule to be this, that whatever expence may have been incurred for the necessary safety of the whole concern, and for the general purpose of the voyage, is a matter of general average. And he cited a passage from *Beaves Lex Mercatoria* (a) to this effect, "that when a ship is forced to enter a port to repair the damage she has suffered in a storm, being unable to continue her voyage without apparent risk of being lost,

(a) 166.

in such case the wages and provisions for the crew, from the day it was resolved to seek a port to refit, to the day of her departure thence, with all charges of unloading, reloading, pilotage, and every other expence incurred by this necessity, shall be brought into a general average." Which passage is cited by *Buller J.* in *Da Costa v. Newnham* (a), and seemingly approved of; and there it was held, that if a ship is obliged to put into port to repair for the safety of the whole concern, the charges of unloading, reloading, and taking care of the cargo, and also the wages and provisions of the workmen hired for the repair, were a general average. Now here the ship could not have prosecuted her voyage without returning to port, which was for the general safety, and the plaintiffs only claim contribution for the expences of such return, and in respect of such temporary repairs and expences incident thereto, as were necessary for enabling the ship to resume and perform the voyage. And therefore this claim is like that in *Da Costa v. Newnham*, and may well stand with the principle, that an injury occasioned by mere sea-damage shall not be the subject of general average.

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Holroyd, contrà, argued that the damage occasioned by the ship's running foul was a particular average, being a mere sea-damage, the repairing of which properly belonged to the ship-owner, and was not the subject of general average. And though the cutting away the ship's tackle, if proved to have been done for the preservation of the ship and cargo, might become a general average (b), yet there is no such proof here;

(a) 2 T. R. 413.

(b) See *Birkley v. Presgrave*, 1 East, 220.

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non constat that the cutting away the rigging of the bowsprit was necessary for the general safety, it might be done to save the bowsprit, but the loss of the bowsprit would not necessarily have endangered the cargo. With respect to the expences incurred by the necessity of the ship's return, the doctrine of *Beaves* is not warranted by the authorities, or the modern writers upon this subject (a). It is true that in the case of the *Copenhagen* (b), Sir *W. Scott* allowed the expence of unloading the goods to be a general average, but that was because it was for the common benefit, as well for the preservation of the cargo, as the repair of the ship.

LORD ELLENBOROUGH C. J. If the return to port was necessary for the general safety of the whole concern, it seems that the expences unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from farther prosecuting her voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expences of it; but if any benefit ultra the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the ship-owner

(a) *Marsh. Insur.* 539. 2d edit.

(b) 1 *Rob. Adm. R.* 294.

only,

only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment. The amount of the expences of repairing to be placed to the account of general contribution must be strictly confined to the necessity of the case, and the arbitrator will have to determine how much was expended upon such repairs as were absolutely necessary to the enabling the ship with her cargo to prosecute the voyage; and for so much, and no more, the defendant will be liable to contribute. As to the charge for the captain's expences during the unloading, repairing, and re-loading, the ship-owner must bear the captain's expences in port, and crimpage must be disallowed, it does not come under general average.

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LE BLANC J. I think the necessary expences of repairing the ship to make her fit to prosecute the voyage, may come under the head of general average, but no farther than that. It will therefore be a question of calculation in settling the amount of general average, how much was absolutely necessary for enabling the ship to pursue her voyage, and all beyond that will be set down to the account of the ship. The unloading may be general average if it were necessary in order to repair the ship.

BAYLEY J. I doubt whether the repair of any particular damage could be placed to the account of general average, inasmuch as it is a benefit done to the ship, and if the captain could make it a general average, by putting into port to repair, it would always be his interest to endeavour to do so. If however the repairs were merely such as were necessary to enable the ship to prosecute

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her voyage home, and were afterwards of no benefit to the ship, such repairs I think would properly come under a general average. Therefore deducting the benefit, if there be any, which still results to the ship from this repair, the rest may be placed to the account of general average.

Judgment for the Plaintiffs.

Friday,
Jan. 27th.

DAVIES against HAWKINS.

Where a number of persons made subscriptions, and formed themselves into a company for brewing ale, &c. and entered into a deed, by which it was agreed that the conduct of the business should be confided to two persons, and the trade carried on in their names, and that they should be trustees for the company so far that the right of action for goods delivered should be in them, and all actions for ale, &c. delivered should be

brought in their names, and all ale, &c. delivered should be considered as their property, &c. and that the directors for the time being should have power to regulate the general business of the company, and that general quarterly meetings of the members should be holden: Held that one person only could not be appointed at a general quarterly meeting, upon the recommendation of the directors, to conduct the business in place of the two persons originally appointed under the deed, unless such alteration was made by the consent of, or after notice to all the subscribers; and therefore plaintiff, who had been so appointed without the consent of or notice to defendant, who was an original subscriber and executed the deed, could not maintain assumpsit for ale of the company delivered to defendant.

IN assumpsit for goods sold and delivered, and the general issue, there was a verdict for the plaintiff at the *London* sittings in *Michaelmas* term 1813, for 161*l.* 14*s.* 6*d.* subject to the opinion of the Court on a case reserved, the material facts of which were these: In 1807 a number of persons, about 600, associated together as a company, and made subscriptions, which subscriptions were divided into shares of 50*l.* each, for the purpose of establishing a brewery for ale, &c. under the name of the British Brewery. The subscribers entered into a deed which contained, among others, these provisions: that the shares should be transferable, &c. the purchaser executing the deed, and binding himself to observe the regulations, &c. contained therein; that a committee to be appointed should have power to make rules, orders, and bye-laws, subject to confirmation by

a majority of the proprietors at a general meeting; that the conduct of the business of the brewery should be confided to two persons who should be styled brewers, and the trade should be carried on in their names, and they should be trustees for the company so far that the right of action for goods delivered should be in them, and their names should be used in all actions and contracts, &c. and in particular all actions for ale or other articles delivered should be brought in their names, and with that view all ale and other articles delivered should be considered as their property, and the bills of parcels should be in their names, &c.: that the directors for the time being should have power to direct and regulate the general affairs and business of the company: that a general meeting of the members of the company should be holden every quarter. The defendant was an original subscriber, and still holds shares, and was for some time a director, and executed the deed. At first two persons were appointed the brewers, but they having withdrawn, the directors recommended to the general quarterly meeting to appoint only one, and that the plaintiff should be appointed. The subscribers accordingly appointed the plaintiff the brewer, and he has continued such ever since. The plaintiff in that capacity delivered to the defendant, at different times, several quantities of ale, brewed for the company. No bills of parcels were delivered, but the deliveries, as they were made, were entered in a book kept by the defendant, upon which was inscribed British Ale Brewery. The defendant paid money on account from time to time at the computing-house of the brewery, and to the collecting-clerks when they called, taking printed receipts, intitled,

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titled, "British Ale Brewery," and signed by the clerks who received the money. In some instances the receipts were expressed to be for *Davies* and Co. The plaintiff's name alone was entered in the books of the excise, and he was personally answerable for the duties, and all contracts for malt, hops, &c. were made by him in his own name. The plaintiff's name, with the words "and Co.," was upon the drays, harness, &c. and the draymen received their orders entirely from him. The action is brought with the consent of the committee.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover; if the Court shall be of that opinion, the verdict is to stand, subject to a reference; if not, a nonsuit is to be entered.

Pollock for the plaintiff made two points: 1st, that the formation and existence of this company was not contrary to stat. 6 G. 1. c. 18. s. 18.; because in order to bring it within the scope of the statute it must tend to the common grievance of great numbers of the subjects; and the mere circumstance of the shares being transferable is not enough to shew that it did so tend. And upon this point he cited *Rex v. Webb* (a), and *Pratt v. Hutchinson* (b); and distinguished *Rex v. Dodd* (c), inasmuch as there the project appeared by the prospectus to be mischievous. 2dly, Which was the only point argued contra, that the plaintiff was the proper person to maintain this action. He said that if the two brewers originally appointed had continued in their office, and *cæteris paribus* had been the now plaintiffs, there could

(a) 14 East, 406.

(b) 15 East, 511.

(c) 9 East, 516.

have been no doubt but that they would have been entitled, because the defendant being an original subscriber, and party to the deed under the provisions of which their appointment was made, and the property and right of action vested in them, would have been estopped from averring against his own deed that the property and right of action were not in them. Then if the two might have sued, it follows that the plaintiff may, because it appears that he was substituted by the consent of the whole body in place of the two, for the directors who had a general superintendence recommended the substitution of the plaintiff, and that was adopted at a general meeting. Or supposing the plaintiff's appointment to be out of the case, still the defendant will be liable, because this was a sale made by the plaintiff to the defendant, and the defendant has accepted the goods, and therefore it shall not lie in his mouth to say that they were not the goods of the plaintiff, especially where he does not shew that the company claim them as their property, or that he will be answerable to any other person if the plaintiff does not recover; on the contrary, it is plain that if he be not answerable to the plaintiff, he is not answerable at all, because the company cannot sue him; and though the plaintiff may be accountable to them for the monies, that can make no difference to the defendant. And in *Lloyd v. Archbowle* (a), and *Mawman v. Gillet* (b), it was determined that the ostensible person who contracts is the proper person to sue, although other persons may have a share in the concern. And there is good reason for holding the same in this case, for otherwise the defend-

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(a) 2 *Tunst.* 324.(b) Cited 2 *Tunst.* 325.

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ant will have the goods, and yet be liable to no one for the payment of them.

Scarlett, contra, urged that it was no reason because the plaintiff could not have any other action, that therefore he should have this. And it is a decisive objection to this action, that after the deed has specified that two persons should carry on the trade, &c. and have the right of action, the plaintiff alone has been substituted for the two, without the consent or knowledge of the defendant; that being such an alteration in the constitution of the company as neither the directors nor the general meeting, without the consent of all the subscribers, had authority to make. If it could be made by any means short of the consent of all the proprietors, it could only be by the committee for making by-laws, &c. And he was proceeding but was stopped by the Court.

Lord ELLENBOROUGH C.J. It is not stated that the defendant had any notice of the appointment of one only, or that he purchased the ale with a knowledge of any such alteration. As to the receipts given in the plaintiff's name, they had also the words *and Co.* attached, which indicated that the concern was not with an individual only. I really do not feel how to get over this objection, however I may be disposed to make the party pay for what he has had. But here a change has been made in the constitution of this company which could not be made without the consent of the whole body of subscribers. It was such a substituted alteration in its constitution as required the assent of all. It does not appear that the defendant acquiesced,
 or

or even knew of the alteration at the time of the purchase. Therefore I am afraid on this point alone it is against the plaintiff.

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LE BLANC J. It is impossible to assist the plaintiff unless the Court could see that this was a contract with him individually.

BAYLEY J. It is stated that the subscribers appointed the plaintiff, if by that had been meant all the subscribers, it might have made a difference.

Judgment of Nonsuit.

The KING *against* the Justices of the West
Riding of YORKSHIRE.

Saturday,
Jan. 28th.

A RULE nisi was granted in last *Hilary* term for a mandamus to the justices to enter an appeal and continuances to their next general quarter sessions against a conviction by two justices of one *Mawson*, for an offence against the stat. 17 G. 3. c. 56. s. 14. The rule was granted upon the ground, as alleged by the affidavit of *Mawson*, that the two justices had not made known to him, at the time of such conviction, his right to appeal to the next general quarter sessions, as required by the 20th section of the act, and that as soon as he was informed of it, which was sometime afterwards, he gave them notice in writing of his intention to appeal, and procured sufficient sureties for trying such appeal, but there not being any meeting of the said

Affidavits in answer to a rule for a mandamus sworn before a commissioner must contain the place where sworn, otherwise they cannot be read.

Upon a conviction by two justices for an offence against stat. 17 G. 3. c. 56. s. 14, if the justices at the time of such conviction make known to the party convicted his right to appeal, and he declines appealing, they

need not go on to inform him of the necessary steps to be taken in order to appeal.

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justices, or of any two justices, before the holding of the next general quarter sessions, he with his sureties attended at such sessions, and entered his appeal with the clerk of the peace; which appeal the justices at sessions refused to entertain, on the ground that he had not given notice of his intention to appeal at the time of his conviction, nor entered into a recognizance, although he proved the service of the above notice, and offered to prove that his right to appeal was not made known to him as above, and tendered his sureties to enter into the recognizance before the justices at sessions.

Monday,
May 16th.

Upon the rule coming on in *Easter* term, it appeared that the affidavits filed by the justices in answer were dated and sworn before a commissioner of K. B., but contained no place in the jurat where sworn; and a preliminary objection was taken to them on that account. On the other side, the case of the *Kennet and Avon Company v. Jones (a)* was cited, where an affidavit to hold to bail, which was taken before a commissioner, omitted to state that he was a commissioner of K. B., and the omission was held immaterial.

But *per Curiam*, it is the constant practice to state the place where the affidavit is taken, by which one medium is afforded to the Court of referring to their records and ascertaining that the person taking it is a commissioner. In the case cited a venue was given, where, if the affidavit were false, the perjury was committed; but here non constat that the affidavits were not taken on the high seas. To dispense with these forms is only to get into uncertainty and mischief, and by a

(a) 7 T. R. 451.

strain of jurisdiction to help parties through that which they ought to look to themselves. The rule was accordingly made absolute.

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And now the justices returned, that they caused the appeal to be entered, &c., and that upon the hearing it was proved to them that the two justices did make known to *Mawson*, at the time of his conviction, his right to appeal to the next general quarter sessions, and that *Mawson* failed to prove that he gave them notice of his intention to appeal; on the contrary it was proved, that at the time the justices so made known to him his right to appeal, he waived any intention of appealing, by replying to them, that he thought he had better pay the penalty; and that *Mawson* did not at the time of the conviction, or at any time before calling on the appeal, enter into a recognizance, &c. Wherefore the justices at sessions conceiving that they had no jurisdiction desisted from entering into the merits, &c.

Holroyd and *Stavely* took exception to this return, that it was uncertain. They said the rule was, that the return to a mandamus shall be disallowed, if it be not certain and positive, for no answer can be given to it (a). And here the sessions were bound to shew with certainty that the convicting justices did all which the law required of them; therefore it is not enough that they have shewn that the justices did inform *Mawson* of his right to appeal, because the law required them to inform him not only that he might appeal, but also of the necessity of giving them a notice in writing, as well

(a) 11 Rep. 99. l.

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as of entering into the recognizance; and of that opinion was Lord *Kenyon* in *Rex v. Justices of Leeds* (b). And though it appears that *Mawson* declared before them, that he had better pay the penalty, yet that did not dispense with the necessity of the justices going farther, because it was not a waiver of the party's right to appeal, and non constat that if he had been informed of the necessary steps to be taken to enforce that right, he might not have elected to pursue it.

LORD ELLENBOROUGH C. J. How could it be necessary for the convicting magistrates to proceed, after the party had signified to them that he did not mean to appeal? The argument is founded upon a supposed necessity of engrafting the observance of all the provisions of the statute, as they apply to another state of things, as was the case of *Rex v. Justices of Leeds*, into this case, where the same reason for their observance does not exist. All that the statute positively requires is, that the justices shall make known to the person convicted his right to appeal; they did so, and if he had thereupon gone on to signify his intention to appeal, non liquet that they would not also have proceeded to make known to him the farther steps that were to be taken by him; but why should they do so nugatory an act as to inform him what he must do to appeal, and to enforce his right, after he had declined appealing, and waived his right.

Per Curiam,

Return allowed.

Scarlett and *Tindal* were for the Justices.

(a) 4 T. R. 583.

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The KING *against* The Inhabitants of MOUNT-
SORREL.

Saturday,
Jan. 28th.

UPON appeal against an order of two justices, removing *Henry Henfrey* and *Mary* his wife from the parish of *Burton Lazars* to the parish of *Mountsorrel*, in the county of *Leicester*, the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper *Henry* in 1807, being under age, bound himself apprentice by indenture for seven years to a person residing in *Mountsorrel*, the pauper and the master being the only parties to the indenture. When the pauper had served about a year, the master left his house and ran away for debt; in consequence of which the pauper applied to him by letter to give up the indenture, and with the master's consent the indenture was given up to the pauper by the person who had the custody of it; the term of seven years not having then expired, and the pauper being still under age. The consent of the pauper's mother, who was his only surviving parent, was not asked at the time of making the indenture, or when it was given up. The pauper after the indenture was given up, and during the term for which the indenture was made, and while he was under age, hired himself as a yearly servant, and served the year in *Burton Lazars*. The Sessions were of opinion that the apprenticeship still continued, and that the pauper was not competent to hire himself, and therefore confirmed the order.

Where an infant bound himself apprentice for seven years by indenture, to which indenture he and his master were the only parties, and after serving some time, in consequence of the master's running away and leaving him, procured the indenture to be given up to him with the master's consent, and afterwards, during the seven years, hired himself as a yearly servant and served a year: Held that he acquired a settlement by such hiring and service, for it was for the infant's benefit under the circumstances that he and his master should be at liberty to put an end to the indenture.

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Dayrell and *G. Marriott* in support of the order of Sessions, contended that the pauper could not avoid this indenture so long as he was within age, upon the principle that all such contracts as an infant makes for his benefit are only voidable by him at full age; and a contract of apprenticeship is for his benefit. For though in *Rex v. Hindringham* (a) it was argued, upon a diversity taken in *Co. Lit.* 380. b. between matters of record done by an infant and matters in fait, that a contract of apprenticeship being a matter in fait, may be avoided either within or at full age, yet Lord *Kenyon* protested against its being taken for granted that an infant might put an end to a contract, which is so notoriously for his benefit, during his minority. And in *Maddon v. White* (b), *Buller J.* inclined against the doctrine in *Co. Lit.* So in *Ex parte Davis* (c), it was determined, not that an infant might elect to avoid the indenture at any time, but that he might do so upon his coming of age. And if the law presumes that a contract of apprenticeship is for the infant's benefit, it follows that the doing away such contract must be presumed to be to his prejudice, and therefore it would be incongruous to suppose that the law will suffer an infant to do such an act whereby he may prejudice himself. Therefore in *Rex v. Austrey* (d) it was held, that if the apprentice be an infant, his master cannot discharge the indenture by his consent alone. And if a discretion were left to an infant to be exercised according to circumstances, it would be liable to frequent abuse. Here there was no necessity that he should act upon

(a) 6 T.R. 558.

(b) 2 T.R. 169.

(c) 5 T.R. 715.

(d) *Barr. S. C.* 441.

his

his own discretion, because he might have applied to two justices for his discharge. (a)

LORD ELLENBOROUGH C. J. Is not this a case in which it was clearly for the benefit of both parties that the indenture should be put an end to? The master had run away, and was no longer in a situation to afford instruction or maintenance to his apprentice. Therefore if the indenture had continued, the consequence must have been that the apprentice would have remained in a state of ignorance and starvation. If that were a state for the benefit of the infant there would be something in the argument. But as it is, the parties have done that for themselves which the magistrates, upon application to them, would have ordered to be done, they have discharged themselves of the indenture which was burdensome to both parties. Under these circumstances I am of opinion that it was competent to them to discharge themselves of each other, since the continuance of the contract would certainly have been of no benefit to the master, and as certainly would have been prejudicial to the apprentice. The benefit of the infant is to be regarded, and in looking to that one cannot but see that idleness, and the probability of extreme indigence, were the necessary consequences of continuing the indenture, from which the magistrates would have interposed to relieve him. I therefore think that we do not indulge any mischievous discretion in the infant, when we permit him to redeem himself from such a probable state of indigence and idleness. Then if this be so, the pauper

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(a) Sec stat. 20 G. 2. c. 19. s. 3.

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was no longer precluded from entering into another service than while his indenture continued.

LE BLANC J. In *Rex v. Hindringham* the master and apprentice did not consent to the indentures' being delivered up, or cancelled.

BAYLEY J. I consider the case of *Rex v. Hindringham* as having proceeded upon the ground that it was for the infant's benefit that the indentures should continue. Here we are in a case, where it was notoriously to the prejudice of the infant that the indenture should continue; therefore I think it was in the power of the master and infant together, by vacating the indenture, to dissolve the contract.

Order of Sessions quashed.

Marryat, Beauclerk, and Phillipps were against the order of Sessions.

Saturday,
Jan. 28th.

MAY against WOODING.

A term's notice is not necessary where there have been no proceedings for four terms after verdict.

THE cause was tried, and the plaintiff obtained a verdict, in *Easter* term 1811, and no farther proceedings were had until last term, when a rule for judgment was entered, and judgment was signed accordingly.

Rule nisi in this term to set aside the judgment for irregularity, upon the ground, that there having been no proceedings for four terms after the verdict, a term's notice was requisite. And rule *M. 4 Ann.* was referred to.

Curwood,

Curwood, who shewed cause, denied that that rule applied to proceeding after verdict.

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Marryat contra insisted, that although the rule did not in terms apply to this case, yet there was the same reason for the practice as well after verdict as before, the reason being, that the party shall not be bound to watch the proceedings for more than a year. And he referred to rule C. P. E. 13 G. 2. which is general, and was made to explain an ancient rule, "that in all cases in which there have been no proceedings for four terms, &c., the party who desires to proceed again, shall give a term's notice to the other of such proceeding, &c."

But per Lord ELLENBOROUGH C. J. The reason of the rule is this, that while the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice, that he may prepare himself, but when the matter has passed in rem judicatam by the verdict, the same reason does not apply. The rule of this court therefore relates merely to interlocutory stages of the cause. No instance is stated where it has been carried farther, and there is no analogy to aid this case. The party may come within four days after the rule for judgment, and move, if he has any thing to allege, in arrest of judgment.

Per Curiam,

Rule discharged.

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Tuesday,
Jan. 31st.CURLING and Others *against* CHALKLEN and
Others.

Debt on bond made by C. and his sureties, with a condition reciting stat. 27 G. 2. c. 38., and that C. (four years before the date of bond) was appointed by the churchwardens and parishioners of D., in pursuance of the statute, collector of the poor rates to be levied and raised in the parish, and conditioned that C. should account, as often as required, for all monies so collected and received by him, by virtue of the act, &c. Breach, for not accounting for monies collected and received since the making of the bond, &c. Plea, that C. accounted for all the monies collected and received by him before the making of the

DEBT on bond, dated the 21st of *July* 1810, by *Chalklen* and the other two defendants as his sureties, in the penal sum of 1000*l*. The plaintiffs set forth the condition in the declaration, which recited that by stat. 27 G. 2. c. 38., intituled, An act for the better relief and employment of the poor of the parish of *St. Nicholas, Deptford*, and *St. Paul, Deptford*, and for repairing the highways, &c., the churchwardens and parishioners of the respective parishes were, in manner therein mentioned, directed to choose and appoint one or more fit person or persons to be collector or collectors of the rates to be assessed, raised, and levied by virtue of the said act in each parish; and that the said churchwardens and parishioners of the respective parishes were thereby required to take such security of such collector or collectors so by them appointed, for the faithful accounting for all such monies as he or they should receive by virtue of his or their office, as to the said churchwardens and parishioners of the respective parishes, or the major part of them, so assembled, should appear a sufficient security for the monies to be received by the said collector, or collectors, from time to time; and also recited, that at a

bond; adly, that the office of collector is an annual office, and that C. accounted for all the monies collected and received by him within the current year of office in which the bond was made; upon demurrer held that both pleas were ill, for by the words of the statute the appointment is prospective, to collect future rates, and not retrospective only, and the condition is in the words of the statute, without any restraining words; and it is not pleaded that the office was an annual office at the time of making the bond, and if it had been, yet it appears by the statute not to be an annual office, though concerning rates which are raised in the course of a year.

public vestry holden in the vestry room of the parish of *St. Nicholas, Deptford*, on the 18th of *June* 1806, to choose a collector of the several poor rates, or assessments, made and to be made in pursuance of the above act, in the room of *A. S.* deceased, *Chalklen* proposed and agreed to collect the said rates or assessments at sixpence in the pound, whereupon the churchwardens and parishioners did nominate, choose, and appoint him collector of the poor rates to be levied and raised in the said parish, in the room of the said *A. S.*, and the condition was, that *Chalklen*, his heirs, executors, or administrators, should make up and render to the churchwardens and parishioners at a public vestry assembled as aforesaid, and as often as thereto required by the churchwardens and parishioners assembled as aforesaid, a full, true, and perfect account of all the monies so collected and received by him or them, by virtue of the said act, and order of vestry as aforesaid, and of all monies rated or assessed, and not received, and pay over the monies so by him, *Chalklen*, collected and received, and remaining in his or their hands, to such person or persons as the churchwardens or parishioners, or the major part of them present at a vestry as aforesaid, should by writing under their hands authorize and appoint to receive the same. And the plaintiffs aver that *Chalklen* continued to be collector from the time of making the obligation to the 25th of *March* 1814, during which time he collected and received on account of such rates, &c. divers sums of money, &c., and was on the 5th of *April* 1814 required by the churchwardens, &c. to make up and render his account of all monies so collected and received, &c., and so they shew for breach his refusing to account, according to

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the terms of the condition, &c. Whereby an action hath accrued, &c.

Plea, that after the making the writing obligatory, and before the commencement of this action, to wit, on the 13th of *May* 1811, *Chalklen* did make up and render to the churchwardens and parishioners, at a public vestry assembled, a full, true, and perfect account of all the monies collected and received by him, *before* the making of the writing obligatory, by virtue of the said act and order of vestry as aforesaid, and of all monies *before* the making of such writing obligatory rated or assessed, and not received, and did also pay over the money so by him collected and received, and remaining in his hands at the time of the making the writing obligatory to the persons authorized and appointed by the said churchwardens and parishioners to receive the same, according to the form and effect of the said condition.

2dly, That the said office of collector within the parish is an annual office, and that *Chalklen* did, when thereto required, render to the churchwardens and parishioners a full, true, and perfect account of all the monies collected and received by him upon or by virtue of all and every the rates or assessments made and assessed under and by virtue of the said act for the said parish, within that year of his office, which expired first after the date of the said writing obligatory, and of all the monies by the said rates or assessments rated and assessed, and not received by him, and did pay over the same, &c.

Demurrer. Joinder.

Marryat, in support of the demurrer, argued as to the 1st plea, that the bond was prospective as well as retrospective; and as to the last, that the plea's merely

alleging that the office was annual was not sufficient, if it appeared by the act of parliament not to be annual, which he contended it did. Upon the 1st point he said, that there was nothing in the form of the bond or condition, or in the making of it, which necessarily restrained it to time past, for it has no words of limitation as to time, and though it was made several years after the appointment, that does not necessarily restrain it to by-gone years. And it appears to be given as a security for the faithful accounting of the principal in the office of collector, which office, by the provision of the act of parliament, is prospective, viz. to collect rates *to be levied*, and is so stated in the recital of the condition; and it is unlimited in its duration, and holden *durante beneplacito*, to be terminated only by the death, removal, or refusal to act, of the person appointed. And therefore the obligation shall be taken to be for so long as the office may continue, as well before the making of the obligation as after, which is the only security that the parish are authorized by the act of parliament to take. Upon the 2d point he said, that it followed in part from what had already been shewn, that the office could not be an annual office, for if it was indefinite as to its duration, it followed that it could not be an annual office. But that would more fully appear by a farther consideration of the act of parliament. For the act (a) authorizes the churchwardens and parishioners, from time to time, to remove the person appointed, and appoint another, so that it is at the pleasure of the parish whether the office shall endure for more or less than a year. They may remove and appoint from *time to time*, it is not said they may do so

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(a) Sect. 6.

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on any fixed day, which recurs annually; whereas the act (a) prescribes that the appointment of governors and directors shall be on the *Tuesday* in *Easter* week yearly. So that an inevitable conclusion arises, not only from what the act has omitted to say in one clause, but from what it has said in another clause, that the office of collector was not intended to be an annual office. And in all the cases upon this subject, where the obligation has been restrained, there has been something to shew that the appointment was for a limited time only, which has been shewn either in the recital, as *Lord Arlington v. Merricke* (b), and *Liverpool Water-works v. Atkinson* (c); or by pleading, as *St. Saviour's, Southwark, v. Bostock* (d); or by the act of parliament, as *Hassel v. Long* (e). But in this case there is nothing either in the recital, or by pleading, to shew the office to be annual, and the contrary is shewn by the act of parliament.

Scarlett, contra, argued that the obligation was not to be extended to any rates to be assessed after the date of it, or at all events, not to any rates to be assessed after the current year of office in which the obligation was made. And first he said that the rule was, not to enlarge the construction of obligations of this sort against the surety, but to construe them strictly. Now although in the recital it is expressed that the parish appointed him collector of the rates *to be levied*, prospectively, yet that is to be restrained by the words of the condition, which are retrospective only, viz. for his accounting for all the monies *so collected and received*, and

(a) *S. 10.*(b) *2 Saund. 411.*(c) *6 East, 507.*(d) *2 N. R. 175.*(e) *Ante*, vol. ii. 363.

rated

rated or assessed and not received, &c.; so that by the express terms of this condition, if he accounted for monies then received, or then rated and assessed, the condition would be satisfied, and it could not use more apt words to shew an intention to confine it to time past. On the other hand, if it had been meant to extend it to time to come, how easy would it have been to have added words to denote future assessments. As there are none such, the Court will not extend the words of the condition, beyond their fair import, to future assessments, but will consider, as they did in *Hassel v. Long* (a), that the consequence of giving them a more enlarged construction would be of so grievous a nature, as to require more clear and certain words than are to be found in this instrument. 2dly, Although the clause which empowers the parish to appoint collectors, does not specify that they shall be appointed for a year, yet it must be remembered that the rates, for the collecting of which they are to be appointed, viz. the poor and highway rates, cannot lawfully be made for a period beyond a year; and it is remarkable that the very clause which authorizes their appointment, enables them to act in the same manner as overseers of the poor may for recovering the poor rates, so that their office seems to have been substituted for the office of overseers of the poor, in respect of the collecting of the rates. And in another clause (b), the rates are directed to be levied in such manner as the rates made for the relief of the poor by the 43 *Eliz.* So that coupling all these provisions together, it appears that the collector, though he is not named in the act an annual officer, yet is ap-

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 CURLINE
 against
 CHALKLEN.
(a) Per Lord *Ellenborough* C. J., *ante*, vol. ii. 370.

(b) S. 8.

pointed

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against
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pointed in respect of rates which may not exceed the compass of a year, and is substituted in place of annual officers, and directed to levy in the same manner as rates made by annual officers are directed to be levied. His authority also must be derived from the successive sets of overseers under whom he acts, and his being appointed collector of rates *to be levied and raised*, is sufficiently explained, by considering that several rates may be and usually are levied within the current year; but those words do not necessarily import, as was said by the Court in *Hassel v. Long (a)*, that the duties should be collected by him after the expiration of the current year. And as to the argument from the appointment of governors and directors, the answer is, that their's was a new appointment; and where a new appointment is directed to be made, it is necessary to particularize for what time it shall be made, but there is no such necessity where one appointment is substituted in place of another which is already limited.

Lord ELLENBOROUGH C.J. We need not trouble the learned counsel in reply. I think it is clear from the act of parliament, and the condition of this bond, that it was intended to be given as a security for the faithful accounting of the principal for the time prior to that when the bond was executed, and also for the whole period of time after the execution of the bond, during which he should continue in the office of collector. The words of the condition are, "that he should render to the churchwardens and parishioners, at a public vestry, &c. and as often as thereto required,

(b) *Ante*, vol. ii. 370.

&c.

&c. a full, true, and perfect account of all the monies so collected and received by him by virtue of the act;" that is, referring to the act, such collections and receipts as the act shall authorize; "and of all monies rated and not received, and pay over the monies so by him collected and received, and remaining in his hands,"

&c. Therefore the condition is prospective, taking its commencement from the date of the obligation, and including the whole period of his continuance in office. The words of the condition are borrowed from the act of parliament. It has been said, however, that this is a case of hardship, as against the surety, and that this is an annual office, and therefore the obligation of the surety shall not be extended beyond the proper period of the office. Certainly, if I saw that it was properly an annual office, I should have been inclined to yield to that argument; but it has been truly observed, that under the 10th section of the act, where it was intended that the governors and directors should be appointed annually, the act provides emphatically for such their appointment, that it shall be on the *Tuesday* in *Easter* week yearly. But I find no such provision in the case of the collector: I find nothing to shew that his appointment is to have an annual commencement, or is to terminate at the expiration of a year; on the contrary, the parish have a power of removing him within the year. I cannot, therefore, engraft words of limitation where the act has not used them, and where the reason of the thing does not seem to require it. Here is a duty not limited by the act to a year, so that it shall extend to that period and no longer, but a continuing duty on the party so long as he shall remain collector, without regard to any definite time, though
it

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it may be that the rates which he is to collect are in form limited to a less or not a greater period than a year. It appears then that there is nothing on the face of the act of parliament, nor of the condition, directly or indirectly, to limit the period of office to a year. Therefore the obligation of the surety cannot be so narrowed; it is indefinite in its language, relating to a period before and after. As to the allegation in the plea that this is an annual office, I consider that as impertinent. The allegation should have been, that it was an annual office at the time when the obligation was made; but that would not have been supported by the act.

LE BLANC J. When the nature of this appointment, and the view with which the act of parliament was passed, come to be considered, the Court, I think, cannot hold that the legislature intended the appointment to be annual. For the act recites that the monies were before collected by the surveyors of the highways, which being an office of burthen, and imposed upon them, occasioned great deficiencies annually in the monies; and for remedy thereof, it provides for the appointment of a person to collect, with a salary, in lieu of those persons who used to come into office annually. Therefore I think the argument fails, that because in some respects the collector is to be the deputy to annual officers, he must be an annual officer himself; because it appears that his appointment was made in order to remove the inconvenience of having an annual officer to collect. Nor does he derive his appointment from annual officers, but under the vestry who are authorized by the act. That brings it to the question, whether, by the terms of the condition, these
sureties

sureties became sureties for his accounting for monies collected and received both before and after the date of the bond. Now in answer to that, it seems enough to say that the form of the bond is according to the form prescribed by the act, which clearly had in view a prospective collection.

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BAYLEY J. I cannot see any thing in this act which imports that the office is to be an annual office. The reason why overseers of the poor, and surveyors of highways, are annual officers, is because no remuneration is attached to their offices, and they are imposed upon them, and are burdensome. But there is nothing in the nature of this office which affords any reason why it should not continue for a longer period than a year. The only cases of its termination, which I find contemplated by the act, are death, removal, or refusal to act. Then upon the question, whether the obligation is prospective or retrospective only, there is nothing in the recital to shew it retrospective only; and if it had not been intended to go along with the office, one should have expected words in the condition to restrain its effect. But the words in the condition are the very words of the act. I have collated them, and find them precisely the same. Therefore it must be intended that they were meant to be prospective, the same as the act.

Judgment for the Plaintiffs.

1815.

Thursday,
Feb. 24.

WRIGHT and Others *against* BARLOW and
Others.

Devise of lands to *E. B.* for life, with power to charge the same, by any deed or deeds, writing or writings, under her hand and seal, attested by two or more witnesses, or by will, &c. and for securing the raising and payment of the charge to limit and appoint the devised premises to trustees, &c.: Held that the power was not well executed by deed charging the premises with a sum of money, and for securing the same demising them for a term; such deed being signed, sealed, and delivered in the presence of two witnesses, but the attestation indorsed on the deed and subscribed by the two witnesses, expressing only that it was sealed and delivered in their presence.

UPON a case sent from Chancery for the opinion of this Court, the question was upon a devise and power, whether the power was well executed. The devise was of all the testator's lands to *Elizabeth Barlow* for life without impeachment, with several remainders over, and the power was to *E. B.*, after she should be in possession, to charge the same with not exceeding 4000*l.*, by any deed or deeds, writing or writings, under her hand and seal, attested by two or more witnesses, or by her last will in writing, or any writing purporting to be her last will, to be signed, sealed, and published in the presence of three or more witnesses, &c. And for the better securing the raising and payment thereof, it should be lawful for her to limit and appoint the devised premises to trustees for any term of years, redeemable on payment of the monies to be so charged, with interest, &c. *E. B.* became tenant for life, and by indenture reciting the power, and in execution thereof, and declared to be under her hand and seal, attested by the two persons whose names were intended to be thereon indorsed as witnesses to the execution thereof, charged the premises with 2000*l.*, &c., and for the better securing the raising and payment thereof, demised and appointed the premises to two persons for a term of 1000 years, &c. This indenture was signed, sealed, and delivered by *E. B.* in the presence of the witnesses whose names are indorsed as witnesses to the execution. The memorandum of attestation indorsed is thus: "Sealed and delivered by the within-named

named *Elizabeth Barlow*, in the presence of *James Bowen. James Hill.*"

The question was, whether the power was well executed by the indenture.

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Sugden, in the last term, contended that it was, and he admitted that if the Court adhered to their recent decision in *Doe v. Peach* (a), and he should not succeed in distinguishing the present case, the power was not duly executed. But he submitted, that the rule laid down in that case, and in *Wright v. Wakeford* (b), which required that where a power is to be executed by deed, &c. under hand and seal attested by witnesses, the attestation should contain the word *signed*, as well as *sealed and delivered*, was not the correct rule. Such a power, so circumscribed, according to the grammatical construction of the words, only means that the deed should be attested, and does not even require that the witnesses should sign, much less does it that they should sign any specific form of attestation. And this consideration perhaps has not been sufficiently adverted to, that the attestation is always deemed to be a part of the deed itself; it is incorporated in it, and accounted as part of the deed in the payment of the stamp duty, and therefore the whole together forms one integral deed. So that here, as in the body of the deed it is declared, that it is under her hand and seal attested by the two witnesses, and the attestation must be coupled with the body of the deed, there appears to be a sufficient compliance with the power. Besides, if it stood alone, how does the common attestation of "sealed and delivered" exclude the presumption that it was also

(a) *Ante*, vol. ii. 576.(b) 4 *Tampt.* 213.

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signed in their presence? Above all, it is most important to consider that the strict rule established in those cases will overturn all the decisions upon the statute of frauds. For that statute (a) requires that all devises shall be in writing, and signed by the testator, and shall be attested and subscribed by the witnesses in his presence; yet in the construction of those words it has been determined, that an attestation of "sealed and delivered," without the word *signed*, is sufficient (b); and in like manner an attestation has repeatedly been holden to be well enough, though it omit to state, that the witnesses subscribed in the devisor's presence (c). Comparing the language of this power with that of the statute, it is impossible to say that it requires a more strict attestation than the statute, the very reverse being the case. Therefore to hold to *Doe v. Peach* will be to overrule all the decisions upon that statute. And the stat. 54 G. 3. c. 168. does not remedy the inconvenience of the decision in *Doe v. Peach*, for the statute is only retrospective. But taking *Doe v. Peach* to be the governing case, the present is capable of distinction; and a slight difference, considering the nature of that case, will be sufficient to take it out of so strict a rule. Now the difference is, that here the power gives two distinct authorities; for beside the power to charge, there is also a power to limit a term for securing the charge, and the formalities to be observed in the execution of the first power, are not required in the last, so that doubtless the last might be well executed by a simple note in writing unattested. And to this point are the cases of

(a) 29 Car. 2. c. 3. s. 5. (b) *Trimmer v. Jackson*, 4 Burn. E. L. 130.
(c) *Hands v. James*, Com. R. 531. *Croft v. Pawlet*, 2 Str. 1109. *Brix v. Smith, Willet*, 1.

Fitzgerald v. Fauconberg (a), *Lestrange v. Temple* (b),
and *Hardwin v. Warner*. (c)

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LORD ELLENBOROUGH C. J. observed, that the last point was not made a question for the opinion of the Court, but simply whether the power was effectually executed by the indenture. And as to that, after inquiring whether *Doe v. Peach* had been decided before this case was directed, and being answered in the negative, his Lordship said that the Court felt themselves bound by that decision. If it was thought fit to agitate the question farther, it should be brought before a court of error; for without the assistance of the other Judges he should not be inclined to overrule a decision, which the Court, upon the authority of a like decision in another court, had so recently come to, and that not without reluctance.

Holroyd was to have argued contra.

The following certificate was sent:

We have heard this case argued by counsel, and are of opinion that the aforesaid power given to the said *Elizabeth Barlow* was not duly and effectually executed by the said indenture of the 20th of January 1781.

ELLENBOROUGH.

S. LE BLANC.

J. BAYLEY.

2d February 1815.

(a) *Fitzgib.* 207. 3 *Bro. P. C.* 543.(c) *Noy*, 79.(b) 1 *Keb.* 358.

1815.

Friday,
Feb. 3d.Dor, on the Demise of JACKSON, *against*
RAMSBOTHAM.

Devise of testator's house and garden to *W. L.*, with all his stock, book debts, household goods and furniture thereunto belonging, *after payment of his debts, legacies, &c.*; only passes an estate for life.

Tenant may shew his landlord's title at an end, in ejectment brought against him by the landlord.

EJECTMENT for a house and garden and other premises, tried before *Heath J.* at the last *Suffolk* assizes; and there was a general verdict for the plaintiff subject to a case reserved, the material facts of which were these:

The defendant commenced the occupation of the house and garden as tenant to the lessor of the plaintiff from year to year, from old *Michaelmas* 1800, and of the other premises from old *Michaelmas* 1801, and had notice to quit the whole at old *Michaelmas* 1813. The defence as to the house and garden was this, that one *G. Ashley* being seised thereof in fee in 1761 devised them to his grandson *W. Langham*, with all his stock, book debts, household goods, and furniture whatsoever thereunto belonging, *after payment of his debts, legacies, &c.* and then bequeathed several legacies. The testator died in 1768, and *W. Langham* conveyed the house and garden in fee to the lessor of the plaintiff, and died in 1811, after whose death the defendant did not pay any rent to the lessor of the plaintiff. And it was contended at the trial, that the title of the lessor of the plaintiff as to the house and garden determined by the death of *W. Langham*, inasmuch as *W. L.* took under the devise but an estate for life.

And so the question for the opinion of the Court was, whether the verdict should stand for the whole premises, or should be entered for the defendant for the house and garden.

Hudlock

Hullock for the plaintiff, admitted that after the decision in *Moor v. Denn* (a) he could not contend that the devisor intended to pass a fee to *W. Langham* by reason of the words, "after payment of his debts, legacies, &c." In *Moor v. Denn* words of the same import were used, viz. "after payment of my debts and funeral expences;" and it was held that only a life interest passed; and the same was holden in *Dickins v. Marshall* (b), where the words were similar to the present. But he submitted, that as the defendant had occupied and paid rent as tenant to the lessor of the plaintiff for several years, he was not at liberty to controvert his landlord's title.

1815.

Doz
against
RAMSBOTNAM.

LORD ELLENBOROUGH C. J. The case of *Moor v. Denn* was much considered in this court (c), and went into the Exchequer Chamber (d), and afterwards into the House of Lords.

BAYLEY J. The rent was paid during the continuance of the life estate. It was competent to the defendant to shew his landlord's title at an end. There is authority for that. (e)

Per Curiam,

Judgment for the defendant
as to the house and garden,
and for the plaintiff
as to the rest.

Best was for the defendant.

(a) 2 B. & P. 247.

(c) See 5 T. R. 358. 6 T. R. 175.

(e) See *England v. Slade*, 4 T. R. 682.

(b) *Cro. Eliz.* 330.

(d) 1 B. & P. 558.

1815.

Friday,
Feb. 3d.ROE d. PETER and ELIZABETH his Wife against
DAW.

Devise of "all my lands in T. to A. B. during her natural life, and after her death to T. B., his heirs and assigns, and for want of heirs begotten by T. B. to M. B. and E. B., except 20l. to be paid out of E.'s part of the lands to M. B. Held that M. and E. B. took only for life.

EJECTMENT. Plea, not guilty. At the trial before *Dampier J.* at the last *Lent* assizes for *Cornwall*, there was a verdict for the plaintiff, subject to a case, the material facts of which were these:

Mary Hender being seised in fee of the premises in question, by her will, dated 11th *April* 1757, after giving 5s. to *Thomas Hender* then her heir at law, &c. and an annuity of 20s. to her sister *Joan Combe* for 13 years, chargeable on her lands in *Trenhorne*, devised as follows: "Item, I give unto my sister *Ann Bant* all my lands and tenements in *Trenhorne* in *Lewannick* aforesaid, (being the premises in question,) and elsewhere, during her natural life, subject to the annuity aforesaid; and from and immediately after her death I give, devise, and bequeath all my said lands in *Trenhorne* aforesaid unto my nephew *Thomas Bant*, and to his heirs and assigns, and for want of heirs begotten by the said *T. Bant*, I give the said lands in *Trenhorne* aforesaid unto my two nieces *Mary Hender Bant* and *Elizabeth Bant*, except 20l. to be paid out of *Elizabeth's* part of the lands to *M. H. Bant*." The devisor died. Afterwards *Ann Bant* the sister died; and *Thomas Bant* the nephew entered and died without issue. *Mary Hender Bant* married and died leaving issue. *Elizabeth Bant* survived *Mary Hender*, and died, leaving the defendant her son by her husband *G. Daw*. *Elizabeth* the wife of the lessor of the plaintiff is the heiress at law of the devisor. And the questions were,

1st,

1st, What estates *M. H. Bant* and *E. Bant* respectively took under the will.

2dly, Whether they took as joint tenants, or tenants in common.

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ROE
against
DAW.

Burrough, for the plaintiff, contended, that the two nieces took no more than a joint estate for life. And he observed that there was an absence of all circumstances to denote an intention in the testatrix to pass a fee by the particular devise in question; for the will has no introductory words indicating an intention to dispose of all her estate, neither is the particular devise in words descriptive of her interest in the lands, but merely of locality, viz. "all my lands in *Trenthorne*," &c. And the testatrix has in two instances expressly used words of limitation in devising these lands, 1st, to her sister for life; and, 2dly, to her nephew, his heirs, and assigns; it would therefore be singular if, knowing how to use words of limitation, she should be supposed, where she has used none, to have intended to limit a fee. If it be argued that the exception of 20*l.* to be paid out of one niece's part of the lands imposes a charge upon her in respect of the land, and therefore, according to the rule in such cases, the testatrix shall be deemed to have devised a fee, such an argument is capable of two answers; 1st, that this is not a personal charge on her in respect of the land, but an exception out of the thing devised, the payment of the charge being to precede the estate; and therefore this is not within the reason of the rule in *Collier's case* (a), or *Doe v. Richards* (b). Another answer is, that there is no pretence for saying

(a) 6 *Rep.* 16.

(b) 3 *T. R.* 356.

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 against
 Daw.

that the exception out of the estate devised to one niece, supposing it could be considered as giving her a constructive fee, could be meant to have the effect of enlarging the estate of the other niece, and yet as both take jointly, it follows that if one is to be deemed to take a fee the other must also. And in that case, if *E.* had died immediately after the devisor, the other niece would not have had the 20*l.* at all, which it is clear the devisor intended she should have in all events. Wherefore the true construction is that they take jointly for life, with an exception out of the share of one. If it be doubtful the heir at law shall not be disinherited.

Gifford, contra, submitted that the two nieces took a fee, whether jointly or as tenants in common was immaterial. And he denied that the will was without circumstances to shew an intention to pass a fee; for 1st, there is a legacy of 5*s.* given to the heir at law, and next, where the testatrix intended a life estate only, she has expressed it; as in the devise to her sister; if therefore she intended the same to her nieces, why did she not also express it? And to this effect *Wilmot J.* argues in *Baddeley v. Leppingwell* (a), "He devises," says he, "to *C.* expressly, for and during the term of his natural life, &c. but in the devise to *S.* he omits the words for and during her life, which words it must be supposed he would have inserted, if he had intended to give her only an estate for life, because he had just before done so in the preceding devise to *C.*" And therefore he concludes that, "it is plain that by giving

(a) 3 Burr. 1541.

it to her generally, without any such restrictive words, as he had before added, he meant to give her the absolute property." The same argument was adopted by Lord *Kenyon* in *Andrew v. Southouse* (a). Also it must be observed that this is the ultimate devise, there is no residuary devise. Then from the exception of 20*l.* to be paid out of one niece's part of the lands an intent is to be collected to pass a fee. For it was not meant as an exception out of the thing devised; such an exception in a grant would be void (b), because there cannot be an exception of a thing certain, out of a thing particular and certain; and for the same reason it would be void in a devise; it is therefore a charge out of the estate, and the rule is that a charge to be paid out of the rents and profits shall not enlarge the interest, aliter, if it be upon the person or out of the estate. And therefore in *Doe v. Richards* (c), "my legacies and funeral expences being *thereout* paid," was held to pass a fee. The same was holden in *Freak v. Lea* (d); and in *Merson v. Blackmore* (e) it is laid down that "where a gross sum is to be paid out of the lands, it gives a fee to the devisee of those lands." So *Doe v. Snelling* (f), "after having *thereout* first paid my debts," &c. carried a fee; because it was said the devisee was to pay the charge out of the land. In like manner here "to be paid out of *Elizabeth's* part of the lands" imports that she must first take the interest in the lands, in order to pay it out of her part. And that differs it from *Denn v. Meller* (g), where the land was devised only after

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 Rot
 against
 Daw.

(a) 5 T. R. 294.

(b) See Co. Lit. 47. a. 2 Roll. Ab. 454. pl. 2. 7.

(c) 3 T. R. 356.

(d) 2 Lev. 249.

(e) 2 Atk. 341.

(f) 5 East, 87.

(g) 5 T. R. 558. 6 T. R. 175. 1 B. & P. 558. 2 B. & P. 247.

payment

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 against
 DAW.

payment of debts. And as to the argument that if *E.* takes a fee the other niece must also take a fee, which could not be intended, this was clearly intended, that she should take as large an estate as *E.* whatever that might be, and 20*l.* more.

LORD ELLENBOROUGH C. J. If we were allowed to form conjectures upon a subject of this sort, it might be a very probable conjecture to form, as the learned counsel has contended, that this testatrix, after having carved out a life estate in these lands, and an estate tail by implication, when she came to make the ultimate devise, conceived that by using general words she was disposing of the absolute property. For testators, as it has been observed both by Lord *Mansfield* and Lord *Kenyon*, often take no distinction between what is sufficient to pass an estate of inheritance, or a mere chattel interest, but think that the same words which will pass the one are sufficient to convey the other. But the rule of law will not permit the inheritance to be so dealt with, and unless there are words of limitation, or some other provisions or expressions to indicate an intention to pass the fee, the rule of law says that no more than an estate for life shall pass. Now the main argument in this case has been upon the provision, excepting 20*l.* to be paid out of *Elizabeth's* part of the lands, which it has been contended is a charge to be paid out of the lands, and therefore a fee shall pass; and I agree if it be a charge to be paid out of the lands in the hands of the devisee, the argument is good. But it appears, I think, from *Denn v. Moor*, as well as from the principle on which *Doe v. Richards* was decided (a), that in

(a) See 5 T. R. 562, 3. per Lord *Kenyon*.

this

this case a fee does not pass, because this is not a charge upon the estate in the hands of the devisee. The devise is of the lands to her two nieces *M.* and *E.*, except 20*l.* to be paid out of *E.*'s part of the lands to *M.*: as if the testatrix had said, I give the lands to my nieces equally, except in this respect, that before *E.* shall take any beneficial interest in her part, *M.* shall have out of it 20*l.*, or in other words, *E.* shall have her moiety minus 20*l.* It is therefore a charge antecedent to the devise, not a devise upon condition of paying, as in *Collier's case*; it is collateral to the interest of the devisee; *except* indicates that *M.* shall take the 20*l.* independently of any interest in *E.* And therefore this case is borne out, as it seems to me, by *Denn v. Moor*, which was first decided by this Court, afterwards went to the Exchequer-chamber, where that decision was reversed, but was finally re-established in the House of Lords, with the concurrence of the Judges who had reversed it in the Exchequer-chamber. So, in this case, I think that *E.* took no more than a life-estate, and consequently neither did *M.* take more. I agree with the argument that if *E.* had taken a greater interest, *M.*, the more favourite object, would have taken also.

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 ROX
 against
 DAW.

LE BLANC J. If the rule of law, as it regards a devise of lands, had been, that where a testator devised a chattel interest by general words, and afterwards devised his lands, without making any alteration in the words, an absolute interest in the lands, the same as in the chattel, should pass, perhaps it would have better satisfied the intentions of testators. But that is not the rule of law, and we must now take it, that where there
 is

1815.

 Roe
 against
 Daw.

is a devise of lands generally, without words of limitation, it will convey only a life estate, unless it be accompanied with a charge on the devisee, or on the lands in his hands. Then the only question is, whether this was meant to be a personal charge on the devisee, or on the lands in her hands. And I think that *Doe v. Moor* determines that question, because the words of that will, though not precisely the same as the present, were as strong as the present to import that it should be a charge on the devisee, and yet it was held otherwise. Here the words are, "except 20*l.* to be paid out of Elizabeth's part of the lands to M.:" the will does not say, "to be paid out of that part of the lands which E. shall first take," nor "to be paid by E.:" therefore I consider the words as tantamount to "after payment of 20*l.* to M.:" If so, I think it is better to adhere to a case which has been deliberately considered and determined, than to rely on a very slight variance of expression in order to get out of the rule of law.

BAYLEY J. I agree to the rule that unless there be words of limitation to denote the quantum of interest, or to charge the devisee, or the lands in the hands of the devisee, a fee does not pass. That I consider as determined in *Doe v. Moor*, and many other cases, and particularly in *Doe v. Clarke* (a), where, though legacies were charged on the land, yet it was held clearly not an estate in fee. In this case I find nothing to make the 20*l.* a charge on E. the devisee, or on the lands in her hands, but it is a charge on the lands in whatsoever hands they may be. The words neither

(a) 2 N. R. 343.

import

import a charge on the person nor on the interest which she takes. In *Andrews v. Southouse* it was clear that the payment was charged upon the person of the devisee.

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Rex
against
D.A.W.

Judgment for the Plaintiff.

BANKS *against* BRAND and Another.

Friday,
Feb. 3d.

REPLEVIN. The defendants make consuance as bailiffs of the commissioners appointed by stat. 50 G. 3. c. 39. (inclosure act) under a warrant of distress for non-payment of several sums of money ordered by the said commissioners to be paid by the plaintiff by virtue of the said act. The plaintiff pleaded several pleas in bar. Afterwards a rule was obtained by the defendants to stay proceedings upon payment of the costs of the action, and distress, to be taxed by the master, and upon delivering up the replevin bond to be cancelled.

Proceedings in replevin stayed after consuance and plea in bar, upon payment of costs of the action and distress, and replevying and delivering up the replevin bond to be cancelled, there being no special damage.

E. Alderson shewed cause, and relied upon *Hodgkinson v. Snibson* (a), where the Court refused to stay proceedings in replevin upon payment of costs on the application of the defendant, although the declaration was general, and did not assign special damage. So 8 Mod. 379. *Anon.* the defendant justified damage feasant, and the Court took the distinction, that if you bring in what is due on the replevin bond, proceedings shall be stayed, but if it is to stay proceedings on payment of what is due for damages, it shall not be granted,

(a) 3 B. & P. 603.

for

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against
BRAND.

for the Court has no rule to guide them in such a case; but otherwise for rent, for that is certain.

But *per Curiam*. The plaintiff has got his goods again, and does not make any claim in respect of special damage for the detention. In other cases, as in trover, it is a matter of course upon the goods being restored to stay proceedings, unless the plaintiff will elect to proceed for the special damage. And here there seems to be no difference.

Rule absolute on the terms
prayed in the rule, together with the costs of replevying. (a)

Robinson, in support of the rule, mentioned *Pickering v. Truste*. (b)

(a) *Le Blanc J.* had left the court.

(b) 7 T. R. 53.

Saturday,
Feb. 4th.

The KING against KERRISON.

Where certain persons and their successors were authorized, by act of parliament, to make a river navigable, and to cut the soil of any persons for making any new channel, &c. by virtue of which they cut through a highway, and rendered it impassable, and a bridge was built over the cut, over which the public passed, and which had been repaired by the proprietors of the navigation: Held that the proprietors, and not the county, were liable to repair.

INDICTMENT for not repairing a bridge, which set forth that by stat. 22 Car. 2. intituled, &c. certain persons and their successors were appointed Commissioners for making navigable the river *Waveney*, from *Beccles* to *Bungay*, and for that purpose to cleanse, &c. and to cut, dig, or use the ground or soil of any persons for the making, enlarging, straightening, or altering the channels of the river, or for the making any

new channel, &c. or other things necessary for making the river navigable. And that for defraying the charges thereof it should be lawful for the undertakers to demand and take rates for the carriage of coals, &c. conveyed by any boat or vessel between *Bungay* and *Beccles*, &c. And that by virtue of the said act a certain navigable channel was by the undertakers cut and dug through and over a certain ancient common king's highway, in the parish of *Ditchingham*, in *Norfolk*, leading from *Bungay* to *Beccles*, for horses, carts, carriages, &c. and that by means thereof the said highway became and was stopped up, and rendered wholly impassable, and that the undertakers have maintained and continued, and still do maintain and continue the said channel for the purpose of the navigation of the said river, and for their own benefit, profit, and convenience, as the owners and proprietors of the said navigation, and did become liable to erect, and did on the 1st of *March* 1695 first erect a bridge over the said navigation, and became and were liable, and have been accustomed and ought to keep the same in good repair as proprietors and owners of the said navigation, and by reason of the tolls and rates granted by the said act; and so the indictment charged that the bridge is out of repair, &c. and that the defendant by reason of his being the owner and proprietor of the said navigation ought to repair and amend the same. 2d count, that there was a certain common king's highway in *Ditchingham* over which the undertakers in the said act mentioned did cut and dig a certain channel, by means whereof the said highway was rendered impassable, and that it became necessary, and the duty of the said undertakers to erect a bridge, and that they did accordingly

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ingly on the 1st of *March* 1695 erect such bridge, and that the said highway was altered from its usual course, and carried over the said bridge, and that the said undertakers maintained and continued the said bridge, and repaired and amended the same. And so concludes as in the 1st count.

Upon not guilty, there was a verdict for the crown on both these counts at the last *Suffolk* assizes, subject to a case reserved, which set forth the statute of *Car. 2.*, and farther that at the time of its passing there was an ancient mill called *Wangford-Mill*, standing across the river, and adjoining to the mill there was a bridge over the river, uniting the counties of *Norfolk* and *Suffolk*, and a public highway between the counties leading over the bridge. About the year 1690 the proprietors of the navigation, for the purposes of the navigation, and by virtue of the powers vested in them by the act, made a navigable cut on the *Norfolk* side of the river, across the said highway, by means of which they united the part of the river above with that below the mill, and in this cut they built a lock for the passage of vessels from the one part of the river to the other. The cut rendered the highway impassable, and a bridge was built over it and upon the lock. This bridge is not necessary to the navigation, nor in any manner useful to it, but is necessary to the public who pass upon the highway, and has always been used as a means of passage along the highway over the cut. There was no direct evidence by whom the bridge was built, but it has been repaired from time to time by the owners and proprietors of the navigation for the time being. It has also been repaired several times by the defendant, who has been since 1784, and still is sole owner and proprietor of the navigation. It

has never been repaired by the inhabitants of *Norfolk*. The defendant receives the tolls upon the navigation for the passage of vessels, but no tolls are paid in respect of the passage over the bridge.

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against
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The question for the opinion of the Court is, whether the defendant is bound to repair the bridge: if so the verdict to stand; if not, a verdict of not guilty to be entered.

Blosset Serjt. for the crown, relied on *Rex v. Inhabitants of Kent* (a), upon the authority of which he contended that the undertakers of this navigation having exercised the powers given them by the act to make a cut across the highway, were bound to build a bridge for the passage of the public, and were liable to repair it so long as they continued the cut for their own benefit under the authority of the act. It is true that in the case cited the private act empowered the company to make channels, &c. and also to amend or alter bridges, "leaving them or others as convenient in their room," &c. which was construed to import a condition that they should leave another passage as convenient; but here are no such words of condition. Nevertheless the case is in point, for this indictment contains every matter of charge which the plea in that case did, and upon that plea the judgment was founded, though it did not set out the words of the private act. In *Rex v. The Inhabitants of Lindsey* (b) there were no such words of condition, and though the plea did set forth the private act, yet the Court decided upon the general law. "The authority," says *Le Blanc* J., "given to the

(a) 13 East, 220.

(b) 14 East, 317.

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company to make the cut, which rendered the highway impassable without a bridge, must create an obligation on them to erect the bridge, though the word *authorize* in the act might not of itself create it." So per *Grose J.* "The public cannot be liable to repair a bridge erected and continued for the private benefit of the company, for without the cut made by the company for their own benefit, there would be no necessity for the bridge." And *Rex v. Stoughton* (a) shews that an individual may be charged as well *ratione nocumenti*, as *ratione tenuræ*, and that so long as the nuisance is continued his liability will last.

Abbott contra, observed that it was not found as a fact in the present case, that the undertakers first built the bridge; whereas in *Rex v. Kent* and *Rex v. Lindsey* it was found that the respective companies who were charged with the reparation, built the bridges, and it was clear from both those acts, which named bridges, that the legislature intended the companies should be liable to repair them. But in this act there is no mention of bridges nor any words of condition, and though it cannot be denied that the necessity of the bridge originated with the making of the cut, yet that does not prove that those who made the cut built the bridge; nor if it did, would it follow that they were chargeable with the reparation. And this act is not like those which clearly give some private benefit to the parties, in which case it may be reasonable enough that so long as their benefit continues they shall be chargeable: but here the act supposes that the concern will not be bene-

(a) 2 *Saund.* 160.

ficial to the undertakers, and therefore says, "in case they would undertake the same." And the two cases relied on *contra*, were determined before the case in 1 *Roll. Abr.* 368. had been examined and found not to be warranted by the record: but since the last case of *Rex v. Inhabitants of Kent* (a) it seems that if a person make a cut for his own benefit, and in order to prevent a nuisance thereby to the public build a bridge over it, the public, if they use it, will be bound to repair.

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KEARISON,

LORD ELLENBOROUGH C.J. The undertakers of this navigation have a duty, as it seems to me, arising out of the execution of their own powers under the act. The act enables them to cut new channels as occasion should require; and if occasion requires them to cut through a public highway, their duty is to furnish a substitute to the public by means of a bridge. Can we put any other construction upon the act but this, that the legislature intended that so far as regarded the making the river navigable, and the cutting new channels for that purpose, neither public nor private rights should stand in their way, but still they should make good to the public in another shape the means of passage over such ways as they were empowered to cut through. What has been done is not a mere incommoding the passage, leaving the public a partial enjoyment of the highway, but it is a total deprivation of the means of using it. I am not aware that what we now decide will at all clash with what we decided in the last case of *Rex v. Inhabitants of Kent*.

(a) *Ante*, vol. ii. 513.

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LE BLANC J. The proprietors had a right to make a cut through the highway, and so far were not wrongdoers: but if they had left it so, I conceive they would have been wrongdoers, and might have been indicted.

BAYLEY J. There would have been no difficulty in framing an indictment against the proprietors for not building a bridge. The indictment might have charged them with cutting across the highway, and if they had pleaded the act of parliament, the Court would have determined upon it, that they had power only to make the cut sub modo, that is providing a substitute to the public. This differs from the last case of *Rex v. Inhabitants of Kent*; there the county derived a very essential benefit from the bridge; they had before but a passage through the ford, which is always an inconvenient one: but what benefit does this county derive from passing over a bridge instead of the solid highway?

Judgment for the crown.

Monday,
Feb. 6th.

The KING against The Sheriff of MIDDLESEX in
a Cause of BRIDGER v. SMITH.

If bail be put in in the county where the defendant is arrested upon a testatum capias, it is not a nullity if the county whence the testatum issued appear in the margin of the bail-piece, and

RULE nisi for setting aside an attachment against the sheriff for irregularity. The defendant *Smith* was arrested upon a testatum capias in *Kent*, the original being in *Middlesex*, and bail was put in in *Kent*, *Kent* being inserted in the bail-piece, but in the margin were these words: "Testatum from *Middlesex*."

and an attachment shall not go against the sheriff.

Bayly,

Bayly, who shewed cause, relied on *Smith v. Miller* (a), and *Harris v. Calvert* (b), as shewing that bail was not regularly put in.

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against
The Sheriff of
MIDDLESEX.

Marryat in support of the rule contended that the words in the margin of the bail-piece made the distinction in this case, because there was something to import that the bail was put in upon a *Middlesex* original.

And, per *Curiam*, It seems well enough by reason of the notice in the margin.

Rule absolute.

(a) 7 T. R. 96.

(b) 1 East, 603. See 2 B. & P. 516. *Champion v. Knox*.

ROBERTS *against* HARDY, WALKER, and Others.

Tuesday,
Feb. 7th.

IN trespass and false imprisonment, to which the defendants pleaded several justifications under the statutes of bankrupts (c), there was a verdict for the plaintiff at the sittings before Lord *Ellenborough* C. J. against all the defendants except *Walker*, damages 1s., subject to a case reserved, upon which the question was, whether there was a good petitioning creditor's debt to found a commission of bankruptcy against the plaintiff. The material facts touching that question were these:

A debt due to two partners is good to support a commission of bankruptcy, notwithstanding one of the partners is resident in an enemy's country, such residence not being shewn to be an adhering to the enemy.

The defendant *Walker* and one *Coggill* were partners in trade, and between them as such partners, and the plaintiff, there were mutual accounts; upon which the plaintiff was indebted to them in more than 100*l*. In

(c) 13 Eliz. c. 7. 1 Jac. 1. c. 15. 5 G. 2. c. 30.

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1811 *Coggill* having been for a short time in the United States of *America*, came to *England*, and in *July* 1812 returned to *America*, taking his wife and family with him, previously to which, viz. on the 18th of *June* 1812, the United States declared war against this country, but that was unknown at the time when *Coggill* set sail from *Liverpool* for *New York*. An act of congress was passed to enable *British* subjects to quit *America* within six months from the declaration of war, and during that period there was no obstruction to their quitting it, and several vessels cleared out from *New York*, where *Coggill* resided, for *Liverpool*, with *British* subjects on board. After the six months no vessels cleared out direct for *England*, but some cleared out for *Lisbon* and other places, and there were some, though not many, opportunities, for *British* subjects to leave the United States, of which many availed themselves. *Coggill* did not leave the United States, but in consequence of an order of government that *British* subjects who did not take advantage of the law should fix their residence at places to be chosen by themselves, sixty miles in the interior from *New York*, and five miles from any navigable river, he procured a passport, when the six months expired, and went and resided with his family at a place answering the description in the order of government. He did not trade there, nor was under any restraint, except that *British* subjects were ordered not to quit their places at their peril, but he was at large, and not being a prisoner of war was not liable or entitled to be exchanged. At this place he resided when the commission of bankruptcy was issued against the plaintiff on the petition of *Walker* and *Coggill* founded on the above debt.

The

The question for the opinion of the Court is, whether the plaintiff is entitled to recover: if he be, the verdict to stand; if not, to be entered for all the defendants.

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against
HARDY.

Scarlett for the plaintiff contended that the debt was not good to support the commission, by reason that *Coggill*, to whom jointly with *Walker* it was due, was resident in an enemy's country. And he cited *McConnell v. Hector* (a), which he said differed only in this, that there the partners were carrying on trade as well as resident in an enemy's country; but from *O'Mealy v. Wilson* (b), as well as *De Luneville v. Phillips* (c), it seems that a voluntary residence in a hostile country is of itself an incapacity, which whether the party trades or not is an adhering to the king's enemies. So here *Coggill* had his option to quit or remain in an enemy's country, and he has chosen the latter, therefore his residence there till explained is *prima facie* a hostile adherence. In 3 *Rob. Adm. R.* 17, et seq. Sir *W. Scott* discusses this point, and in 5 *Rob. Adm. R.* 91. he considers it as a circumstance, if a party is beginning to take measures to remove within a reasonable time after the breaking out of war, that ought to operate in favour of his claim to restitution,

Lord ELLENBOROUGH C. J. Here is a person who in a season of profound peace sets out for a foreign country, and it does not appear at what time he arrived there, or what time was afforded him after his arrival, and after the country became hostile, to turn himself round in order to take measures for quitting it, during the period allowed by law. Non constat that he might

(a) 3 *B. & P.* 113. (b) 1 *Campb. N. P. C.* 482. (c) 1 *N. R.* 97.

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not have arrived there but a very short time before the expiration of the six months. It is too much therefore to attach upon his remaining there, and not getting away from the country upon its becoming hostile, those disabilities which belong to a person who adheres to the king's enemies. I reserved the point on the authority of *McConnel v. Hector*, and in deference to the judgment of the Court of Common Pleas, and of Lord *Alvanley* in particular; but there it is observable was a trading, and Lord *Alvanley* states both a residence and trading. If that fact was so here we might draw the conclusion. The plaintiff must recover upon his own strength; the defendants meet him upon the bankruptcy, which is *primâ facie* good, but the plaintiff's reply is, that one of the petitioning creditors is resident in an enemy's country, and therefore adhering to an enemy. But I think a mere residence is not sufficient to make out that.

LE BLANC J. The case does not state how much within the six months the party arrived in *America*, so that it does not appear what portion of time he had to avail himself of the liberty to quit the country. The case simply states circumstances whence a conclusion is to be drawn, and in the court of admiralty the judge is to draw that conclusion; but we are not to draw the conclusion from a number of facts, that the party was adhering to the king's enemies, where there is no fact of adherence stated.

BAYLEY J. Upon this case it is left in doubt whether the residence was voluntary or constrained.

Judgment for the Defendants.

Littledale was to have argued for the defendants,

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The KING *against* The Inhabitants of BURTON-
UPON-TRENT.

Wednesday,
Feb. 8th.

UPON appeal against an order for the removal of *Elias Price* from *Grooby* in *Leicestershire*, to *Burton-upon-Trent* in the county of *Stafford*, the Sessions confirmed the order, subject to the opinion of this Court on the following case :

The pauper's father, who was settled at *Desford*, and whose real name was *Joseph Price*, was married at *Leicester*, by licence, by the name of *Joseph Grew*, having changed his name to *Grew* because he had deserted from the army, and he was known by that name only at *Leicester*, where he lodged at the time of his marriage, and where he had resided 16 weeks. He never passed by any name but *Price* in his father's family, and in the place where they resided. His wife did not know his real name till a fortnight after the marriage, when he told it her. The pauper was the issue of this marriage, and was born at *Burton-upon-Trent*, and after his birth his parents were married by the true name. The Sessions considered the 1st marriage as invalid, and therefore that the pauper was not entitled to his father's settlement.

A marriage by licence, not in the man's real name, but in the name which he had assumed because he had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was held a valid marriage.

Dayrell and *Beauclerk* in support of the order of Sessions, argued that the ceremonies required by the law to constitute a valid marriage, were for the public benefit as well as individual security, and therefore whether the marriage be by banns or licence, it is essential that it should be by the true name of the parties, otherwise

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wise it is a nullity. And this differs from *Rex v. Bellinghurst* (a), because there the party had acquired a name, and an acquired name becomes the true name. But here the name, beside that it was assumed for 16 weeks only, was assumed for the purpose of a fraud, in order to conceal the crime of desertion.

LORD ELLENBOROUGH C. J. There is not any occasion to trouble the other side. If this name had been assumed for the purpose of fraud in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the marriage act and the rights of marriage, and the Court would not have given effect to any such corrupt purpose. But where a name has been previously assumed so as to have become the name which the party has acquired by reputation, that is, within the meaning of the marriage act, the party's true name. The same law has been recognized in the case of negotiable instruments, where if a party sign an instrument in a name assumed by him for other purposes a considerable time before, such signature will not amount to a forgery; but otherwise if he assume a name by which he had never been known before for the purpose of the fraud (b). Now here the party assumed the name for the purpose of concealment and not of fraud upon the marriage, and he was known by that name alone for 16 weeks in the place where he was married. It seems to me therefore that he had acquired the name, and that to have had a licence in any other name would have been a fraud on the marriage act.

(a) *Ante*, 250.

(b) See *R. v. Shepherd*, 2 East, P. C. 967. *Aickin's case*, *ib.* 968.

LE BLANC J. The name was assumed by the father for the purpose of concealing himself as a deserter from his majesty's service, and not with a view to impose upon the woman whom he married.

BAYLEY J. The Sessions may always draw the line, whether the name was assumed for a fraudulent purpose as it regards the marriage or not.

Orders quashed.

Holbeck and G. Marriott were against the order of sessions.

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tants of
BURTON-UPON-
TRENT.

The KING *against* JOHNSON.

Wednesday,
Feb. 8th.

ERROR to reverse a judgment of transportation for 14 years, given at the *Lancashire Lent* assizes, upon an indictment against the defendant for embezzling bank-notes. The indictment charged that the defendant, late of, &c. was clerk to the trustees of the *Liverpool Docks*, and being clerk as aforesaid, did then and there, by virtue of his said employment as such clerk as aforesaid, receive and take into his possession for and on account of the said trustees of the *Liverpool Docks*, *divers (to wit) nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money (to wit) the sum of 9l. of lawful money, and of the value of 9l. of like lawful money, and the*

In an indictment upon 39 G. 3. c. 85. for embezzling bank-notes, it is a sufficient description of the notes to say, divers, to wit, nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9l., and of the value of 9l.: and if in the body of the indictment it be al-

leged that the defendant received them as clerk on account of his employers, and feloniously embezzled the same, the indictment may conclude "and so the defendant did feloniously steal, take, and carry away the bank-notes," laying them to be the property of his employers, for that is the statutable conclusion from the facts alleged in the body of the indictment.

A count for embezzling bank-notes upon the statute may be joined with a count for larceny.

defend-

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defendant having so received and taken into his possession the said bank-notes for and on account of his employers the said trustees of the *Liverpool* Docks, he the defendant afterwards, to wit, on, &c. with force and arms, at, &c. fraudulently and feloniously did embezzle and secrete the same; and the indictment concluded, "so the jurors aforesaid do say, that he the defendant, on the said day, &c. with force and arms at, &c. in manner and form aforesaid, feloniously did steal, take, and carry away the said bank-notes from his said employers, the said trustees of the *Liverpool* Docks, the said bank-notes being then and there the property of the said trustees of the *Liverpool* Docks, on whose account the same were received by and taken into the possession of him the defendant, being such clerk as aforesaid, and the several sums of money payable and secured thereby being then, to wit, at the time of the committing the felony aforesaid, to wit, at, &c. due and unsatisfied to the said trustees of the *Liverpool* Docks, the proprietors thereof, against the form of the statute, and against the peace, &c." There were several other counts, not materially differing from the above, together with counts for a larceny, in the common form, of divers other bank-notes for the payment of money, that is to say, nine bank-notes, for the payment in the whole of 9*l.*, and of the value of 9*l.*, the said last-mentioned bank-notes, at the time of committing the felony last aforesaid, being the property of the said trustees of the *Liverpool* Docks, and the several sums of money payable and secured thereby being then due and unsatisfied to the said trustees of the *Liverpool* Docks, the proprietors thereof, against the form of the statute, and against the peace, &c. Plea, not guilty, and verdict of guilty, and judgment

ment as above. And the errors assigned were, that there is no sufficient description in the indictment of any bank-note which the defendant is thereby charged with having embezzled; 2dly, that there is no sufficient allegation in the indictment that the bank-notes which the defendant is thereby charged with having embezzled, at the time of such embezzlement were the property of the trustees of the *Liverpool Docks*, or that the defendant hath been guilty of larceny by the said embezzlement thereof; 3dly, that there is a misjoinder of counts in the indictment, inasmuch as the same contains counts for embezzlement framed upon the statute made and passed in the 39th of G. 3., and also counts for grand larceny, upon which a different judgment is by law to be given, &c. Joinder.

J. Williams in support of the errors assigned, after adverting to the rule that an indictment ought to be certain, and could not be made good by intendment (a), argued, 1st, that here was a want of certainty in the description of the thing charged to be embezzled or stolen. And he said, that the same certainty was required in the count for the embezzling as in that for the larceny, because the embezzling was, according to *McGregor's* case (b), a larceny. Formerly it was the practice upon all indictments for stealing notes or other securities to set out the notes, &c. at full length, and so late as *Milnes' case* (c) a question was reserved for the opinion of the Judges, whether an indictment for stealing *a promissory note for the payment of one guinea* was sufficiently descriptive of the note. That case determined,

(a) See 2 *Hawk. P. C. c. 25. s. 6c.*

(b) 3 *B. & P.* 106.

(c) 2 *East P. C.* 602.

that

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that such a general description was sufficient; but it has never yet been determined that an indictment is sufficient, which contains no description of any particular note whatever. And such is this indictment; for all that it alleges is, that he received *divers* bank-notes, laying the *number*, and *amount* for which payable, under a videlicet, so that neither need be precisely proved (*a*); for although the defendant be proved to have received but one, he might be convicted under this form of indictment. Therefore there is no certain description of any particular note or number of notes, unless this intendment can be made, that he received nine *1l.* notes; which, beside that it would be contrary to the fact, would be an intendment in a thing material in the description, which cannot be made (*b*). Many are the authorities to shew that in larceny the thing stolen must be described with convenient certainty; for instance, to say *bona & catalla* is void for the uncertainty of its description (*c*); or to say, *felonice furatus est oves*, or *columbas*, without expressing their number (*d*); or *quod felonice cepit 20 oves matrices & agnos*, or *matrices & verveces*, is not good, because it doth not appear how many of one sort and how many of another (*e*). So in *Playter's case* (*f*), in trespass *quare clausum fregit & pisces suos cepit*, &c. without shewing the number or nature of the fish, it was resolved that the declaration was insufficient on that account, and was not made good by verdict; and judgment was arrested. And that is a direct authority, or rather an authority *a fortiori* upon the present case,

(*a*) *Symmons v. Knox*, 3 *T.R.* 68. *Grimwood v. Barritt*, 6 *T.R.* 460.
& *Williams's Saund.* 291.

(*b*) 2 *Hawk P. C. c.* 25. s. 60. (*c*) *Ibid. c.* 25. s. 74.

(*d*) 2 *Hale P. C.* 182.

(*e*) *Ibid.* 183. (*f*) 5 *Rep.* 36.

because Lord *Hale* says (a), that “regularly the same certainty is required in an indictment for goods, as in trespass for goods, and rather more certainty, for what will be a defect of certainty in a count, will be much more defective in an indictment.” And this generality of allegation, it may be observed, beside that it does not afford to the accused sufficient notice of the charge, is prejudicial to him in another way, for if it were specific as to some particular note or notes, the proof must accord with the description of some one note in the indictment, otherwise the defendant would be entitled to an acquittal; whereas now the proof is left at large to any note or number of notes, or any value within the compass of 9*l*. As to the 2d error, the *body* of the indictment does not state that the notes were the property of the trustees, or that the defendant stole them, which in larceny (b) it ought to do, but that is only stated in the *conclusion* of the indictment, which is insufficient. For the *body* of the indictment must shew all that is essential to constitute the offence, and then the conclusion draws the inference of law, but the conclusion cannot supply any defect in the *body*. Lord *Hale* (c) and *Hawkins* (d) both agree that the *body* of the indictment ought to set forth the substance and manner of the fact, and that it is only the office of the conclusion to draw a correct inference from the premises in the *body*, and that it must be warranted by the premises (e). As if in murder the *body* of the indictment say *percussit*, without saying *ex malitiâ præcogitatâ*, the conclusion *et sic ex malitiâ præcogitatâ* *murdravit*, will not supply it. So

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(a) 2 *Hale* P. C. 183.(b) *McGregor's case*, 3 B. & P. 106.(c) 2 *H. P. C.* 174.(d) 2 *Hawk.* c. 25. s. 54.(e) 2 *Hale* P. C. 188. *Heyden's case*, 4 *Rep.* 41. b. *Ogle's case*, *ib.* 42. b.

here,

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here, inasmuch as the body of the indictment only alleges that he received the notes on account of the trustees, and feloniously embezzled them, without saying that they were the property of the trustees, or in technical language, that he stole them, this defect cannot be cured by the conclusion; nor, if it could, does the conclusion *that he did in manner and form aforesaid steal*, &c. carry it any farther, because in *manner and form aforesaid*, is the same as saying, as in the body of the indictment is alleged, but in the body of the indictment it has been shewn that no larceny is alleged. 3dly, Here is a misjoinder of counts, which is plain from considering that they require different judgments. For the judgment in all cases of grand larceny is *quod suspendatur per collum*, &c. unless the convict pray the benefit of clergy (a). But not so with this new larceny created by the embezzling act (b), because the act which creates it provides a specific punishment, viz. that he shall be liable to be transported for 14 years, so that the convict has no occasion to pray the benefit of clergy, inasmuch as the punishment can in no wise extend to life. This may be illustrated by considering how the law stands upon the statutes concerning receivers of stolen goods, for by the 5 Ann. c. 31. s. 5. receivers shall suffer death as felons convict; but by 4 G. 1. c. 11. *they may be transported for 14 years*, which has been considered as ousting the judgment of death (c). So here judgment of death being ousted upon the count for embezzling, the joining the count for larceny is ill, and within the rule laid down by Lord Kenyon in *Rex*

(a) 25 Ed. 3. c. 4. 5 Ann. c. 6.

(b) 39 G. 3. c. 85.

(c) But it seems they must pray the benefit of the statute; 2 Esq. P. C. 744.

v. *Young* (a), "that if the legal judgment on each count be different, it is like a misjoinder in a civil action."

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J. Clarke, *contra*, argued upon the first point that the stat. 2 G. 2. c. 25. which made bank notes the subject of larceny, in like manner as any other goods, meant to place them, as to larceny, upon the same footing in all respects as other goods, so that they might be described in an indictment for stealing them by the same general mode of description that would serve for other goods. It is admitted that the indictment for embezzling is for a larceny; therefore the question is, whether there be such a description of the notes in this indictment as would be sufficient to describe other goods in an indictment for larceny. Now these things are required in an indictment for a larceny of goods; first, that the goods be described by the general name of their kind, as to say *horses, fish, &c.* is sufficient; and afterwards the evidence particularizes the species; but to say *bona & catalla* is not enough, because such a description is applicable to goods of every kind. The next thing required is, that the number of the things stolen, if there be more than one, should be expressed; then, the value, in order to shew whether it be grand or petit larceny, though the separate value of each thing is not material; and lastly, the property of the thing or things stolen; for want of which the indictment in *McGregor's* case was holden ill. All these requisites will be found in this indictment; for first, it describes the things by the general name of their kind, as *bank notes* for the payment of money amounting to a certain sum, to wit, the sum of 9*l.*; then the number, as divers, to wit, nine; next, the

(a) 3 T. R. 103.

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value, as 9*l.*; and, lastly, the property, as that of the trustees. And there is no uncertainty between different kinds of property, as if it had been nine bank-notes and bills of exchange, without distinguishing how many of each sort; or if it had been *bank-notes* without more, it might perhaps have been objected, as in *Playter's* case (a), that it ought to have shewn the number in certainty. But here the number is shewn, and the defendant has the same notice as if it had said divers, to wit, two 1*l.*, two 2*l.* bank-notes, &c. So an indictment for stealing divers sums of money, to wit, such a sum, which is not more certain than the present, is well enough. In answer to the 2d objection, the body of the indictment sets forth all the facts which are necessary to bring the offence within the act of parliament, and then draws the statutable conclusion from the premises, viz. that the defendant feloniously did steal, &c., which if the indictment in *McGregor's* case had done in the same manner, it would have been well enough. Upon the 3d point, when the legislature have declared that the embezzling under certain circumstances shall be deemed a substantive larceny, it cannot be argued that the counts are misjoined by reason of any difference in the nature of the offence; and the practice has been to join them; and as to different judgments, inasmuch as the statute makes the offence larceny, it lets in any other judgment to which larceny is subjected, as well as transportation for 14 years. But supposing it does not, whether there be different judgments is not always the criterion whether the offence may not be laid in different ways, for Lord *Hale* says (b), that a person

(a) 5 *Rep.* 34. b.(b) 1 *Hale P. C.* 378. See *Fost.* 325. 328.

who

who commits petit treason, may be indicted of murder; yet there are different judgments upon each, as well as different challenges; so, he says, you may join burglary and larceny (*a*). And in this case convenience requires that these counts should be joined, for otherwise there must be separate indictments for the embezzling and the larceny.

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LORD ELLENBOROUGH C. J. Three objections have been taken to this indictment, and they have led to a considerable extent of argument. The last objection, I think, admitted of something arguable, but upon the two first, I own it does not strike me in the same manner. As to the first objection, I consider that after the statute made bank-notes the subject of larceny, they might be described in the same manner as other things which have an intrinsic value, that is, by any description applicable to them as a chattel. Therefore to describe them as bank-notes for the payment of money seems to be a larger description than the statute strictly requires. We find that the stat. 15 G. 2. c. 13. s. 11. speaks of forging, counterfeiting, or altering "any bank-note," without adding for the payment of money; as if the legislature adopted that as a general phrase sufficiently comprehensive of the particular species of note, without thinking it necessary to specify it to be bank of *England* in contradistinction to a country bank-note. Now in this indictment the notes are described as bank-notes; it sets forth both number, value, and species. Bank-note is the species, the value is 9*l.*, and the number is stated to be nine. And thus

(*a*) 2 Hale P. C. 173.

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we find there has been a compliance with the strict and technical rule of law. So the rule is that a time must be laid in the indictment, but though it must be definite in allegation, it is indefinite in proof; yet, inasmuch as the forms of law require that the person who charges another must bring himself within the limits prescribed by the law, some certain time must be laid in the indictment. In the same manner, if bank-notes be recognized by that description in the act of parliament, the indictment has done enough in laying them under such a description; but it goes further, and adds, unnecessarily perhaps, "for the payment of money," and moreover gives their amount in number and value. It has been argued as if the prosecutor was bound to prove the exact amount of the value and number laid, whereas if he proved only one bank-note of the value of 1*l.* it would be sufficient to maintain the charge. If the indictment had charged the things to have been nine printed books of the value of 9*l.*, instead of nine bank-notes, and one book had been proved to have been stolen, it would have been well enough; so here it is laid that the amount is nine, and the value 9*l.*, and why is not this the same? The total amount in both cases imports that the number consists of more than one, but still more than one need not be proved. Upon the second objection, undoubtedly all the requisites must be stated which are necessary to the constituting a larceny at the common law. But the act has specified what the circumstances are which shall be sufficient to constitute it a larceny, and under which circumstances the offender shall be deemed to have feloniously stolen. First, he must be a servant or clerk, &c.; then he must receive or take into his possession
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the bill, &c.; and that must be for or on account of his master; and he must fraudulently embezzle the same; all which is alleged upon this indictment. These are all the circumstances which the legislature have required to make this a substantive felony; and under these circumstances it is that they declare the offender shall be deemed to have feloniously stolen. That is the conclusion of law which the legislature have drawn. In stating that conclusion, the indictment must allege in legal terms a felonious stealing; for want of which the indictment in *Rex v. M'Gregor* was holden to be imperfect, because it omitted to state that the monies were the property of any person. But the legislature have said, that if all the facts stated in the act be made to appear, that will warrant the conclusion in legal terms that it is a larceny. And this disposes of the second objection. Then upon the last objection, touching the misjoinder, certainly if this were an offence of a perfectly different nature, I should have been of opinion that the judgment could not have been sustained. But the act says that the offender shall be deemed to have feloniously stolen, which is expressly constituting it a felony, and having so done, the offender must, as in the like cases of felony, pray the benefit of clergy. But inasmuch as it is larceny, and therefore liable only to the punishment of seven years' transportation, this act goes farther and gives power to transport for fourteen years. The act does not alter the quality of the offence; he is to be deemed a felon, and as such must pray the benefit of clergy, just the same as if this enactment for an extended term of transportation had not been found in the statute. It makes no alteration in the judgment; the judgment is to pass

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against him as a felon; if he does not pray the benefit of clergy, it must be a judgment of death. And in a variety of cases though the punishment be different, yet counts may be joined. For instance, in the offence of embezzling naval stores, the having in possession new stores, or stores not more than one-third worn, is subject to transportation for 14 years (*a*); but if they be not new, or be more than one-third worn, the punishment is different (*b*); yet counts for both these offences may be included in the same indictment. So in conspiracy, the judgment upon conviction is that the party is infamous; and yet nothing is more familiar than to add to counts for a conspiracy other counts which do not include a charge of conspiracy. So that the rule does not seem to apply to all cases, that where there is a different judgment counts cannot be joined. I do not advert to what has been mentioned from Lord *Hale* of joining murder and petit treason; because the circumstances are not sufficiently stated whether it was the same person (*c*). But I make no observation on that case. Here I think it does not appear that there is a misjoinder; because both are clergyable felonies; and the defendant is liable to the punishment incident to such a felony with an extension of it to the term of 14 years. Upon all the grounds therefore I think the objections are not available in law.

LE BLANC J. The objections which have been made, and the answers given to them, may be better understood by adverting to the several acts of parliament. The subject of this indictment is bank-notes,

(*a*) See 39 & 40 G. 3. c. 89. s. 1. (*b*) *Ibid.* s. 2. (*c*) See *Fost.* 329.

which were not the subject of larceny at the common law, because they fell under the denomination of choses in action. The 2 *Geo.* 2. c. 25. has expressly made mention of bank-notes as one of the things which are to become for the future the subject of larceny. This provision is followed in several other acts down to the act of the 52 *Geo.* 3. c. 64., which makes the obtaining of bank-notes by false pretences punishable in like manner as obtaining money or goods. Thus we find that a bank-note is a thing specifically recognized by that description in several acts of parliament, and among others, as being the subject of larceny. This act of 39 *Geo.* 3. was passed in consequence of doubts which were entertained, whether a servant was guilty of felony in applying to his own use a bank-note that had never been in the possession of the master, but had only come to the hands of the servant for the purpose of being delivered over to the master. And the statute enacts and declares that if any servant or clerk shall, by virtue of his employment, receive into his possession any note, &c. for or on account of his master, and shall fraudulently embezzle the same, he shall be deemed to have feloniously stolen the same from his master, for whose use the same was delivered into his possession, &c. Now, the form of indictment which has been pursued ever since the passing of this statute, has been to state in what manner it is that the party is guilty of larceny, by describing him as the servant, or in the employment of some person, and that he did receive into his possession the particular thing on account of his master, and that he did embezzle that which he so received, and then to conclude in the technical terms of the law, and so he did feloniously steal the particular

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thing, laying it to be the property of his master. It is not now material to inquire whether it would not have been sufficient, since the passing of the act, to indict simply for the larceny, leaving the particular circumstances necessary to bring it within the act of parliament as matter of evidence; it is enough that this form of indictment has prevailed. Here then the indictment states that he received divers, to wit, 9 bank-notes, &c. upon which it has been argued as if bank-notes were not the specific thing made the subject of larceny. For where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny. For instance, it is not necessary in charging a larceny of sheep to describe it either as a wether, ewe, or lamb, yet it cannot be doubted, if such an argument could prevail, that it would be of advantage to the prisoner that it should be described more particularly, because if it were, and the prosecutor in such case should fail to prove it to be of that particular description, the prisoner would thereupon be entitled to an acquittal. So also it may be said of bank-notes, it is not necessary to describe it particularly as a bank-note for the payment of 1*l.*, 5*l.*, or 20*l.*, because for whatsoever sum it may be payable, it is still a bank-note. In like manner in an indictment for stealing a handkerchief, it is not necessary to describe it as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality. The argument upon this part of the case has arisen from the practice that has prevailed of describing the particular sum for which the note is payable, and that the money secured thereby is unsatisfied.

tified. But the answer to such an argument is this, that whether it be payable for one sum or for another, it is equally a bank-note, and a bank-note is the subject of larceny. Therefore this is not a good objection that the bank-note is not sufficiently set out. No farther description is necessary than is required for other chattels which are the subject of larceny; and under the general name of bank-note, the particular species, if the sum for which the note is payable can be said to constitute a species, may be proved. The next objection is, that the indictment does not aver that the defendant was guilty of feloniously stealing, taking, and carrying away the bank-notes in the body of the indictment, but that it only so alleges in the conclusion, as the inference of law from the premises. But the answer is, that the act has declared under what circumstances a person shall be deemed to have feloniously stolen, and this may be considered as a special count in larceny, stating those circumstances, whereupon the act immediately attaches upon the person the crime of larceny. Consequently this indictment well concludes by way of averment that the defendant feloniously stole, took, and carried away the notes, being the property of the trustees, who stood in the relation of his masters. And thus far *Rex v. M'Gregor* is an authority upon this point, that although such a conclusion is a deduction of law, yet it forms so material a part of the indictment that for any defect in it an indictment is ill. The third objection arises upon a supposed misjoinder. I do not think it is material to consider upon this occasion, whether, supposing there might be judgment of death upon one count, and no more than judgment of transportation for 14 years upon the other, the joining them

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would be ground of error; because I cannot but consider the act as making this offence a larceny, and that having so done it attaches upon it all the properties and consequences attaching upon the crime of larceny; and that the power given to transport for 14 years was only intended for the purpose of enabling the Court to affix a greater length of transportation to this larceny than could be done in other cases of larceny at the common law; but not to oust the judgment as in other cases of larceny. If it were otherwise, there would be considerable difficulty in reconciling the uniform practice that has obtained upon convictions under the statute to pass judgment for every one, in their turn, of the lesser punishments applicable to grand larceny. Thus the practice has been to pass judgment of fine, or imprisonment, without regard to the term of 14 years, and without any transportation; all which would be erroneous if the argument were well founded that transportation for 14 years is the specific punishment peculiar to this offence. So it has been the practice for the offender convict under this act to pray the benefit of clergy; which is conformable with the construction now put upon the act, and which the act declares, that he is to be deemed in law to have feloniously stolen. Wherefore, as it seems to me, there is no misjoinder in this case, and judgment must be affirmed.

BAYLEY J. I entirely agree with the Court upon all the three points. Upon the first, it appears to me that *bank-notes* is a sufficient description of the thing embezzled. Many acts of parliament have described them as bank-notes, and no otherwise; therefore I must take it that *bank-notes* is in general a sufficiently certain description of this chattel. If that be so, is it necessary

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to go farther in this indictment, and state of what particular value each bank-note is? I think not; there is no authority to make that necessary, and the prisoner must always know what he has received. Upon an indictment for stealing printed books, as it has been observed by my Lord, it is not necessary to do more than to name so many printed books. If the charge be generally that the defendant stole divers, to wit, 20 printed books, that will be sufficient; which seems to me a strong instance bearing on this point. It has been admitted by the learned counsel for the prisoner, that if it be necessary upon this charge of embezzling and secreting bank-notes to describe the notes more particularly, it would be likewise necessary, upon a similar charge respecting money, to describe the component parts of which that money was made up: but I will presently mention a case which is decisive upon that point. The next objection is, that the first part of this indictment does not state all the requisites to constitute a felony at common law. But it states all the circumstances which the statute makes requisite, and then by way of conclusion avers all the requisites at the common law. It was for want of such a conclusion, and because the conclusion omitted to state what the common law requires to constitute a larceny, that the indictment in *Rex v. M'Gregor* was holden ill. The case of *Rex v. Creighton* (a) was decided after that of *Rex v. M'Gregor*, and the indictment charged that the prisoner was employed as a clerk to A., and that, by virtue of his employment, he received from B., on account of his master, *gl. 18s. 9d.*, *without shewing of what monies that sum was made up*, and that he frau-

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(a) We understood this to be the name, but are not certain.

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duently embezzled and secreted the same, omitting the word feloniously; and so it concluded that the jurors say that he did feloniously embezzle, steal, take, and carry away, &c. Objection was made that in the introductory part of the indictment it was not alleged that he did feloniously embezzle, &c. and that therefore the indictment failed to shew that he had committed a felony, and that unless it was so shewn in the body of the indictment, it was not enough that it was so alleged in the conclusion of it. The Judges, however, considered it to be sufficient that it was stated in the conclusion, and the indictment was holden good. That seems to me to be an authority both on the first and second points against the objections. As to the last objection, if a conviction upon one count would lead to a different judgment from that which would follow a conviction upon the other, if one be judgment of death, the other of transportation only, I should think it an objection of great weight. But I consider that when the statute declares that the offender under the circumstances shall be deemed to have feloniously stolen, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. Therefore, as in other cases of grand larceny the party convict will be liable to judgment of death unless he pray the benefit of clergy, so it is the same in this case. Some of the ordinary consequences of a conviction of grand larceny have been shewn to follow a conviction under this act; for although the act gives no power to fine or imprison, the common law punishments, still it is the practice to impose such punishments; and the Court is not confined to the specific punishment of transportation for 14 years mentioned in the act. The reason

why the mention of such a punishment was introduced into the act is probably this, that the legislature meant that the party convict should not only be liable to all the ordinary punishments attaching upon a conviction of a clergyable felony, but that he should also be liable to a greater term of transportation than in other cases of clergyable felonies. For these reasons I am of opinion with the rest of the Court that this indictment is sufficient, and that the judgment ought to be affirmed.

Judgment affirmed.

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DOE, on the Demise of TAGGART, *against* *Thursday,*
Feb. 9th.
SARAH BUTCHER.

EJECTMENT brought against the defendant, a feme sole, who before trial married with one *Dan-gey*, and there was a verdict against her and judgment thereon in her original name. And afterwards the plaintiff issued an habere facias possessionem, and also a fi. fa. in the same name. Whereupon a rule nisi was obtained for setting the writs aside for irregularity.

Ejectment against a feme sole who married before trial, and verdict and judgment against her by her original name: Held that it was regular to issue an habere facias possessionem, and fi. fa. against her by the same name, though the fi. fa. was inoperative.

Taddy contended that the writs were regular, inasmuch as they pursued the judgment. And he took the distinction, that if it had been intended to charge the husband, there he must first have been made a party by scire facias; but it is not necessary to join him, for the execution may follow the judgment. And therefore in *Cooper v. Hunchin* (a) a ca. sa. issued against the defendant by her maiden name, who married after in-

(a) 4 East, 521.

terlocutory

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terlocutory judgment, was held well enough. And *Lawrence J.* approved of the case of *Doyley v. White, Cro. Jac. 323*. If then a ca. sa. would have been good against the defendant by her original name, a fortiori will these writs be good, which do not affect her person, and particularly an habere facias possessionem to recover the term, which is affected by the judgment.

Espinasse, contra, took the difference that was taken in *Penoyer v. Brace (a)*, that “where a new person shall become chargeable to the execution of a judgment, who was not party to the judgment, there a scire facias ought to be sued against him, to make him party to the judgment.” And here, he said, if this execution were well issued, the effect would be to make the husband chargeable in respect of such rights as he acquired in the term by the marriage, and also in respect of his goods, for the wife could have no goods. As to the cases cited *à contra*, they were cases of execution against the person of the wife, where the husband was not chargeable.

LORD ELLENBOROUGH C. J. The motion is made under a mistake; for this proceeding is not with a view of taking any thing which belongs to the wife. The plaintiff has recovered in the ejectment, because she had no right or interest in the premises. And unless she can by marriage convey to the husband what she never had, there is still no interest in either of them. All right in her to the premises is disaffirmed by the judgment. And as to the fieri facias, it is wholly in-

(a) *Ld. Raym.* 245.

operative,

operative, inasmuch as she has ceased to have any goods. It is unnecessary therefore for the Court to interfere.

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BAYLEY J. It would be irregular under the *fi. fa.* to take the goods of the husband, for the writ is only to take her goods, and she has none.

Per Curiam,

Rule discharged.

SMILES *against* WRIGHT.

Thursday,
Feb. 9th.

TWO persons submit by bond to the arbitration of two others named as arbitrators, and a third as umpire, so as the award be made by the arbitrators on or before a day certain, but if the said arbitrators do not by the time aforesaid make their award, then the bond shall not be avoided, provided the umpire make his award on or before a subsequent day. The arbitrators made no award, having finally, before the day limited for making their award, disagreed, and declared that they did not intend to make any award, whereupon afterwards and two days before the time of the arbitrators expired, the umpire made his umpirage. And upon a rule nisi for setting aside the umpirage upon the ground that the umpire had no authority to make it until after the day limited to the arbitrators had expired,

Submission to two, so as they made their award on or before a day certain, but if they do not by the time aforesaid make their award, then to an umpire, provided he make his award on or before a subsequent day, the arbitrators finally disagree before their time expires, and declare they will not make any award, and do not make any: Held that the umpirage might be made, after the final disagreement of the arbitrators, before the time allowed them had expired.

Richardson shewed cause, and contended that the umpire was not necessarily prohibited *ex parte ante* from making his umpirage before the expiration of the time given to the arbitrators, but the meaning of the submission was, that whenever the arbitrators deter-

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mined their power, whether by renouncing it, or by suffering the time to elapse, the umpire should have authority to proceed. And here the arbitrators did renounce, and it is not suggested that if the umpire had waited the two days they would have made any award.

Scarlett and *Hullock* contra, said, the arbitrators ought to have had their full time allowed them; that though it was true they disagreed, non constat they might not have agreed during the time; there was a locus poenitentiae left them. And therefore the intention of the parties was, that the jurisdiction of the umpire should not commence until the time when that of the arbitrators ceased. And if that were so, the renouncing of the arbitrators could not give the umpire jurisdiction, because unless he have it by law the act of the parties will not give it him. In the same manner as if the arbitrators had, with the consent of all parties, made their award the day after their time expired, yet such consent could never have made their award good, because by law their jurisdiction had ceased. So here the umpire having made his umpirage before his jurisdiction commenced, the umpirage could not be made good, even supposing the parties had consented to it, which they have not. In *Mitchell v. Harris* (a) it is said by *Holt* C. J. that if the umpire be named in the submission, he cannot make his umpirage before the time given to the arbitrators to make their award has expired.

Lord ELLENBOROUGH C. J. If the arbitrators had chosen to resume their authority within the time, and

(a) 1 *Salk.* 79.

had made their award, it might have been said that here was a conflict of authorities; but they renounced their power, and also announced that they never meant to resume it, and they kept their word. They might have had the full time if they had agreed, but are we to put such a construction upon this submission as that if they finally disagreed before the time, the rest should be so much waste time? If they finally disagreed and determined their power, why should not the umpire proceed? It does not appear to me that any inconvenience could result from it, and it saved a waste of time. The thing has been done by an umpire of the parties' own choosing, and after a full renunciation of their power by the arbitrators. I therefore think that what has been done is within the authority originally intended to be given to the umpire; his umpirage was only defeasible in the event of the arbitrators making their award within due time.

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LE BLANC J. The submission gave the arbitrators so much time, provided they agreed and went on to make their award; but if they failed to make any award, then to the umpire. When, therefore, they finally disagreed, the umpire might proceed; still his umpirage might have become nugatory if within the time the arbitrators had made their award.

BAYLEY J. Notwithstanding what was said by Lord Holt in *Mitchell v. Harris*, the cases seem to be different. In one case, which is mentioned by Serjt. *Williams* in a note to *Coppin v. Hurnard*, where the submission was to two, so as they made their award on or before the 1st of July, and if not, then to the umpirage of a

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third, so as he made it on or before the 2d of *July*, and the arbitrators made no award, but the umpire made his umpirage on the 1st of *July*, it was adjudged well. (a)

Rule discharged.

(a) *Core v. Dore*, Sir T. Jones, 167. S. C. 2 Show. 164. 2 Wms. Saund. 133. s.

Friday,
Feb. 10th.

TAYLOR and Another, Assignees of WALSH, a
Bankrupt, against Sir THO. PLUMER.

Where a draft for money was entrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds. Held that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money.

TROVER for the certificates or securities for 50 shares in the bank of the United States of America, and for the certificates or securities for certain sums in the 3 per cent. funded stock of the United States, and the powers of attorney respectively relating thereto, and also for certain bullion, viz. 71 doubloons and a half. Plea, general issue. At the trial before Lord Ellenborough C. J., at the London sittings after Michaelmas term 1813, there was a verdict for the plaintiffs, damages 10,459*l.* 18*s.* 6*d.* in respect of the securities, and 302*l.* in respect of the bullion, separately, subject to the opinion of the Court upon a case reserved, which stated the plaintiffs to be the assignees of Walsh under a commission of bankruptcy of the 10th of December 1811. Walsh was a stock-broker, who had occasionally been employed by the defendant for some time before 1811. In August of that year the defendant, expecting to have occasion for a large sum of money at Michaelmas to pay for an estate which he had contracted to purchase,

consulted

consulted *Walsh* on the propriety of selling out stock to provide for such payment, and desired him to inform him when he, *Walsh*, thought it would be most expedient to do so. In *November*, the title to the estate not having been then completed, *Walsh*, thinking the funds likely to fall, recommended to the defendant to sell out stock, being principally in a fund which is regularly shut from the beginning of *December* till about the 7th of *January*; and the defendant having considered the matter, on the 28th of *November* sent *Walsh* orders to sell. Sales were accordingly effected by *Walsh* as broker on the 29th to the amount of 21,774*l.* 5*s.* sterling, the transfers to be made and the money to be paid on the 4th of *December*. On the 4th the stock was transferred by the defendant, and the price was received by *Walsh*, who on the same day paid 21,500*l.*, part of the said price, into the hands of Messrs. *Goslings* and Co., the defendant's bankers, to the defendant's account, and saw the defendant and informed him of it. The defendant proposed to *Walsh* to invest the money in exchequer bills until it should be wanted to pay for the estate, and in the evening desired him to call the following day for a draft in order that he, as broker, might buy exchequer bills for the defendant. Accordingly on the next day, the 5th, about 11 o'clock in the forenoon, *Walsh* called, when the defendant said he had more money at his bankers than he wished to keep unemployed, and gave him a draft upon *Goslings* for 22,200*l.*, which he directed him to lay out for him in the purchase of exchequer bills, to be delivered on the same day to him, the defendant, or his bankers. The defendant did not authorize *Walsh*, nor was *Walsh* in any manner authorized to apply the draft or money

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to be received for it, to any other purpose, nor had the defendant any reason to expect or apprehend that it would be applied to any other purpose. *Walsh* went to *Goslings*, received the amount of the draft from them in 22 Bank of *England* notes of 100*l.* each, and one for 200*l.*, but purchased exchequer bills to the amount of 6500*l.* only, having bought them in the usual course of business, and he lodged them at *Goslings* on the defendant's account. About four in the afternoon he called on the defendant and told him that he had lodged the 6500*l.* exchequer bills at *Goslings*, and that he had agreed for the remainder of the intended purchase of exchequer bills to be delivered at a future day, and had therefore left a sum, which he named (being an even sum nearly corresponding with the difference of the 22,200*l.*) to his account at *Goslings*. But the fact was not so; on the contrary, *Walsh* being ruined in his circumstances, and completely insolvent, had, between the time of the sale of the defendant's stock and the time when he received the price of it, conceived an intention of absconding with the money when it should come to his hands, and with that view, on the 2d of *December*, had given orders for the purchase of the *American* shares, stock, and bullion in question, in order to take them with him abroad, having no means of paying for the *American* shares and stock but out of the money he expected to receive belonging to the defendant, nor any money of his own to pay for the bullion, though he might have acquired money for that, but intending to pay for that also out of the defendant's money.¹ Accordingly, after receiving the draft at *Goslings*, he went immediately from thence to the *American* stock brokers in the city, received the certificates, and

and paid for them with 11 of the identical Bank of *England* notes of 100*l.* each, which he had just received, taking back from the broker to whom he paid them the difference of 54*l.* 1*s.* 6*d.* The same morning he delivered to his brother-in-law another of the 100*l.* bank-notes, and received from his brother-in-law in exchange, a draft, of the firm in which he is a partner, on their bankers for 500*l.*, and another draft for 100*l.*, leaving the remainder in his brother-in-law's hands, and with the 500*l.* draft he paid for the bullion, receiving the difference from the goldsmith who furnished it. *Walsh* had a dwelling-house at *Hackney*, where he resided with his wife and family, and also a counting-house in *London*, where he carried on his business. About nine in the morning of the 5th he left his dwelling-house, taking with him cloaths and other necessaries for his journey, intending not to return, but to leave *London* in the evening by the mail-coach, in which he had taken a place on the 3d or 4th, and to proceed immediately to *Falmouth*, and from thence by the first packet to *Lisbon*, and so to *North America*. He left *London* accordingly by the mail-coach, taking with him the securities and bullion in question. He was pursued by the defendant's attorney and a police officer by the defendant's desire, the attorney having a general authority to act for the defendant, but no particular directions, and on the 9th they overtook *Walsh* whilst he was waiting at *Falmouth* for the packet's putting to sea, and he then surrendered up the property in question to the attorney for the purpose of being assigned over to the defendant, and in the course of that day executed a deed, which was prepared by the attorney's order, assigning the property to the defendant in trust

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to sell and pay himself a debt of 15,500*l.* (being about the difference between the price of the 6500*l.* exchequer bills and the 22,200*l.*), also a bond to the defendant in the penalty of 31,000*l.*, conditioned for the payment by him of 15,500*l.*, and interest at 5 per cent., and a warrant of attorney for confessing a judgment upon such bond, which were also prepared by the attorney at the same time, and after being executed, were delivered to him, the attorney and the police officer witnessing the same. They all returned to *London*, when *Walsh* was carried before a magistrate, and afterwards indicted for felony, tried, and found guilty, subject to the opinion of the Judges, but was afterwards pardoned without any judgment having been pronounced (a). The case also stated that the act of bankruptcy was committed on the 5th of *December*, that *Walsh's* advice to the defendant to sell out his stock was given bonâ fide, and no false pretence or imposition was used to obtain the defendant's draft upon Messrs. *Goslings*, or the possession of the money which he afterwards received and misapplied, and that the property in question, which was surrendered by *Walsh* to the attorney, was delivered up by the attorney to the defendant, of whom the plaintiffs demanded it, but the defendant refused to deliver any of it, and sold the whole and received the proceeds. The question for the opinion of the Court is, Whether the plaintiffs are entitled wholly, or in part, to recover: if they are, the verdict is to be entered accordingly; if not, a nonsuit to be entered.

Marryat, for the plaintiffs in the last term, argued that the defendant had not any lien upon the property

(a) See 4 *Taunt.* 258.

in question, as against the plaintiffs, the assignees of *Walsh*, and therefore was not entitled to withhold the proceeds from them. He admitted that specific property in the possession of an agent, who becomes bankrupt, which was entrusted to him for a special purpose, belongs to the principal, and not to the representatives of the bankrupt agent; also that where the property is not the same, but has been acquired by the bankrupt in lieu of the trust property, and in pursuance of the trust, the same rule applies to it, provided such property is capable of being ascertained. So he said is the rule also between a trustee or his executors after his decease, and *cestui que trust*, and *Burdett v. Willet* (a), *Ex parte Chion* (b), and *Haffal v. Smithers* (c), all come within one or other of those rules. But he took this distinction, that where the property has been tortiously acquired by the agent in fraud of the trust, there the lien of the principal is at an end, because he cannot for his own private advantage, and to the prejudice of all the other creditors, aver what has been done in fraud of his trust to have been done in execution of it. And upon this distinction he founded the argument for the plaintiffs; for here he said it was plain that the property which the defendant claimed to retain was property which *Walsh* had acquired by conversion of the trust-property to his own use in contravention of the purposes of his trust. Wherefore it shall not remain to the defendant, but shall pass by the assignment, like the rest of the bankrupt's property, to the general body of creditors (d). In like manner a

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(a) 2 Vern. 638.

(b) 3 P. W. 187. n. A.

(c) 12 Ves. 119.

(d) Cooke's Bank. Law. 391. & seq. 6th edit.

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court of equity has refused to extend the lien to lands purchased by the misapplication of trust-money, *Cox v. Bateman* (a); or to any lands purchased by a trustee, where it is not clear that they were purchased in execution of his trust, *Perry v. Phelps* (b). So that in equity the distinction is plain; where the estate is purchased in execution of the trust, the Court will hold it subject to the trust, but where the purchase is a breach of the trust, cestui que trust stands merely as a simple contract creditor, the estate purchased not being subject to the trust. If, as the defendant would have it, a principal may follow the property entrusted by him to his agent for a special purpose, through all the changes which it may undergo in the hands of the agent without regard to the object of his trust, to what confusion would it lead. According to that, if *A.* entrust his agent with money to purchase a horse, and the agent, instead of purchasing a horse, purchase a carriage, *A.* shall have the carriage. Or if in this case *Walsh* had exchanged the bank-notes in part for goods, and in part for other monies, and with those other monies had purchased bullion, or a shop with the stock in trade, and commenced trader, the defendant would have been entitled not only to the various articles purchased with the bank-notes and monies, but also to the shop and stock in trade, together with all the credits arising from the trade. Such a doctrine would lead to great practical inconvenience, whereas the rule is simple and convenient, that so long only as the property remains identically the same, or subsists in a form consistent with the trust, it shall enure to the benefit of the prin-

(a) 2 Ves. 19.

(b) 4 Ves. 108.

cipal.

cipal. And there is reason as well as convenience in so limiting the rule; for as the principal would not be bound to take the property, if purchased by the agent in violation of the trust, so it is only so long as he would be bound to accept it, that he can reasonably call it his own. In *Scott v. Surman* (a) the factor acted in pursuance of his trust when he took the notes in payment of the goods sold by him for his principal, and therefore the notes might well be deemed the property of the principal consistently with the distinction already taken. The same may be said of *Gladstone v. Hadwen* (b); for the bills were the identical bills which had been delivered to the bankrupt, and the bank-notes were part of the proceeds of one of the bills which had been exchanged by the bankrupt in pursuance of his authority. And besides, the main distinction of that case is, that the bills were originally obtained by the bankrupt by a criminal fraud, indictable, and punishable with transportation; whereas here all fraud in the obtaining of the draft or money is distinctly negatived, and it does not appear that *Walsh* has been guilty of any indictable offence. Under these circumstances could the defendant have maintained trover for the property, if it had been withheld from him? If he could not, the circumstance of *Walsh's* having surrendered the property to him will not vary his rights, nor can the defendant, by accepting the farther securities from *Walsh*, be considered as having waved the tort and confirmed *Walsh's* acts.

Abbott, contra, denied the distinction taken on the other side, contending that the rule was general, that

(a) *Willis*, 400.

(b) *Ank*, vol. i. 517.

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nothing passed by the assignment but what was in equity, as well as law, the property of the bankrupt. Accordingly *Willes* C. J. in *Scott v. Surman* (a), declared that "his notion was that the assignees are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estates of their ancestors and testators, but that nothing vests in them even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest." Upon this principle the Court took notice in *Winch v. Keeley* (b), that the debt, though in point of law due to the bankrupt was subject to a trust, and therefore did not pass to his assignees, but might be recovered to the use of the assignee of the debt. And the same principle governed *Gladstone v. Hadwen*. And the better reason why equity would not interfere in *Cox v. Bateman* and *Perry v. Phelps* seems to be, because it did not appear the lands were purchased with the trust money; besides, in *Cox v. Bateman* the lands were in Ireland. But *Lane v. Dighton* (c), *Balgney v. Hamilton* (d), *Wilson v. Foreman* (e), all shew that if trust-money be misapplied in the purchase of land, a court of equity will follow it in the hands of the purchaser. So equity will follow goods in the hands of a factor, in behalf of him who employed the factor, though the goods were purchased not in pursuance of the factor's authority, *Whitecomb v. Jacob* (f); and in *Ex parte Sayers* (g), a principal was held entitled to follow bills in the hands of his factor, though such bills were not

(a) *Willes*, 402.

(b) 1 T. R. 619.

(c) *Ambl.* 409.(d) Cited *ibid.* 414.(e) *Dick.* 593.(f) *Salk.* 160.

(g) 5 Ves. 169.

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shewn to be part of the proceeds of the bills remitted by him to the factor. From all which it appears that the true distinction is not whether the property in the hands of the factor is such as has been acquired by him in pursuance of his trust, but whether it can be specifically distinguished and ascertained to belong to the principal, and not to the bankrupt (a). Accordingly Lord Mansfield, in *Miller v. Race* (b), finds fault with the reason given for the position, that money cannot be followed, viz. because it has no ear-mark; adding, that "the true reason is on account of the currency of it, it cannot be recovered *after* it has passed in *currency*;" and Buller J. adopts the same distinction in *Rex v. Eginton* (c), when he says, "that if the sum of money in question had been kept by itself, the bankrupt's assignees could not have touched it." As to the argument that where the property has been tortiously acquired by the factor the principal cannot affirm such tortious act, it is contrary to what is laid down by Willes C. J. in *Scott v. Surman* (d), for according to him, "a man may in many cases either consider another as a wrongdoer or as a receiver of money to his use, as he thinks best and most for his advantage;" and therefore he supposes the case of a factor selling contrary to his authority, and says, "even in that case the owner may come either against the vendee or the factor at his election, and may choose to confirm the sale." And upon the same principle it is that oftentimes an action for money had and received is maintained instead of trover; from which no inconvenience can result, so long as the owner is bound to trace and

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(a) Per Lord Mansfield, 3 Burr. 1369.

(b) 1 Burr. 457.

(c) 1 T. R. 369.

(d) Willes, 407.

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ascertain the property to be his, and the rights of third persons do not intervene. As to the observation made upon *Gladstone v. Hadwen* that there the transaction originated in fraud, whereas here was no fraud in the commencement, that can make no difference, if it appear that the property was converted by fraud; nor in this case is it to be assumed that the fraud is not indictable, because it is not indictable as a felony. But independently of any fraud, the defendant is entitled to retain if these positions be well founded; viz. that a party has a right to the produce of his money which has been misapplied by his agent, so long as such produce remains in the hands of the agent, and is capable of being ascertained; and that he has the same right against the assignees of the agent who becomes bankrupt; and consequently that if he possess himself of such produce he has a right to withhold it from the assignees. (a)

Marryat, in reply, said that *Whitecomb v. Jacob*, as it stood upon the report, and unless it could be explained thus, that the money was vested in other goods by the factor *for his employer*, in which case it would come within the rule agreed to on all hands, was of doubtful authority, and had been so treated, subject only to this explanation, by several text writers, and that he had searched at the Register Office for the decree without success. And as to *ex parte Sayers*, that all

(a) *Abbott* made another point as to the time of the act of bankruptcy, in order to shew that it was previous to the conversion of the money, viz. that *Walsh* committed an act of bankruptcy when he left his dwelling-house at *Hackney*, in the morning of the 5th, with the intent stated in the case. But he abandoned that point, feeling so strong upon the general point.

that

that was there done was in execution of the factor's authority; and in *Lane v. Dighton* there was evidence in the party's hand-writing that the trust stocks had been sold, and the money laid out from time to time in the purchase of the land, and nothing to shew that it was not in pursuance of the trust.

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At the conclusion Lord *Ellenborough* C. J., after observing that the case had been well argued, said that from its importance, and considering the grounds on which the argument had been founded, it was fit that the Court should look into it. That he had been unable to find any authority for the position that so long as the property is such as has been substituted by the agent in execution of his authority, the principal is entitled to it; but that the right of the principal ends whenever the deviation of the agent's authority begins. That if there had been any case which had determined that to be the dividing point, it would have been very material to have shewn it.

To which *Marryat* answered, that he did not put it as the point established negatively by any case, but only that none of the cases had affirmed the right of the principal farther than that point.

Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court. After stating the case, His Lordship said, The plaintiff in this case is not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law, viz. that the property of a principal entrusted by him to his factor
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for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified, and distinguished from all other property. And, secondly, that all property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy.

And, indeed, upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authorities of law. And the position which was held out in argument on the part of the plaintiffs, as being the untenable result of the arguments on the part of the defendant, is no doubt a result deducible from those arguments: but unless it be a result at variance with the law, the plaintiffs are not on that account entitled to recover. The contention on the part of the defendant was represented by the plaintiffs' counsel as pushed to what he conceived to be an extra-

extravagant length, in the defendant's counsel being obliged to contend, that "*if A. is trusted by B. with money to purchase a horse for him, and he purchases a carriage with that money, that B. is entitled to the carriage.*" And, indeed, if he be not so entitled, the case on the part of the defendant appears to be hardly sustainable in argument. It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman, Willes, 400.*, or into other merchandize, as in *Whitecomb v. Jacob, Salk. 160.*, for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i. e. as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains, (as the property in question did,) in the hands of the factor, or his general legal representatives. That trust property in the possession of a factor empowered to dispose of it for his principal does not pass to his assignees

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assignees under the stat. *Jac.* 1. upon his becoming a bankrupt, was established in the case of *L'Apostre v. Le Plaistrier*, first tried before Lord *Holt* at nisi prius in 1708, and afterwards so adjudged upon a case made for the opinion of the Court of King's Bench. The same point was held by Lord *Couper* in *Copeman v. Gallant*, 1 *P. Wms.* 320. And in *Whitecomb v. Jacob*, in Chancery, *Trin. 9 Ann. Salk.* 160., the doctrine was carried further, and to an extent which fully comprehends the present case. There, a factor entrusted with the disposal of merchandize for his principal, sold it, received the money, and, instead of paying the money to his principal, vested the produce in other goods, and died indebted in debts of a higher nature. There it was held that those goods should be taken as the merchant's estate, and not the factor's; and though that was not the case of a factor becoming a *bankrupt*, yet it makes no difference whether the person claiming to represent the factor was his executor or administrator, or his assignee; except only as far as the case might be affected by the stat. *Jac.* 1., and which it cannot be, if the factor bankrupt had the order and disposition of the property entrusted to him in the character of factor only, and not as owner: for that point the above-cited cases of *L'Apostre v. Le Plaistrier* and *Copeman v. Gallant*, are authorities. Some doubt was attempted to be thrown upon the authority of the case of *Whitecomb v. Jacob*, *Salk.* 160., in the argument by the plaintiffs' counsel; but that case is expressly referred to by Lord *C. J. Willes* as an authority in law, and recognized by him as such in his judgment in *Scott v. Surman* before referred to. In the case of *Ryall v. Hall*, 1 *Atk.* 172. Mr. Justice *Burnett* (who, together with Lord *C. J. Lee*

and Lord C. B. *Parker* assisted the Chancellor Lord *Hardwicke* in the judgment upon that occasion) is reported to have cited the case of *Whitecomb v. Jacob* as it is given us in *Salk.* 161., as well as that of *Scott v. Sarman* before Lord C. J. *Willes*, (though he cites, or the reporter *Atkins* represents him as citing, the latter by the mistaken name of *Salmon v. Scott*). And Lord C. J. *Lee* recognizes the general principle that things arising from the sale of other things "follow the nature of the goods themselves," and he adds, "Mr. Justice *Burnett* has cited cases to shew that they are so where the thing can be discovered." The cases cited by Mr. Justice *Burnett* were the very cases of *Whitecomb v. Jacob*, (in respect to which the doubt has been suggested to us), and the case of *Scott v. Sarman* before Lord C. J. *Willes*. The cases were cited by Mr. Justice *Burnett*, 1 *Atk.* 172. A. D. 1749. in these terms: "Suppose goods are consigned to a factor, who sells them and breaks, the merchant for the money must come in as a creditor under the commission; but *if the money is laid out in other goods, these goods will not be subject to the bankruptcy*, 1 *Salk.* 160. Suppose, instead of selling the goods for ready money, he sells for money payable at a future day, and breaks before the day, if the assignees receive the money, it will be for the use of the merchant: or suppose that the factor had taken notes for the goods, if his assignees receive the money upon these notes, it will be to the merchant's use. This was determined in C. P., *Salmon v. Scott*, *Hil.* 16 G. 2. 1742, 3." Lord C. J. *Lee* adds, "*Smythburne*, 506. 6th edit. is upon the same foundation. If a man devises his moveable goods to B., and his immoveable to C., upon a question how the debts shall go, he says, those

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debts which did arise by occasion of the things moveable, and for recovering whereof there lies an action personal, belong to that person to whom the testator did bequeath his moveable goods, which shews that the produce of the goods were of the same nature with the goods themselves." Lord *Mansfield*, in 3 *Burr.* 1369., in the case of a bankrupt executor, holds that the specific effects of the testator do not pass under the commission: he says, "If an executor becomes bankrupt, the commissioners cannot seize the specific effects of the testator, not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself." Specific remittances, as in *Ex parte Chion*, 3 *P. Wms.* 187., and in *Hassall v. Smithers*, 12 *Ves.* 119., are governed by the same principle. The representatives, whether deriving their title to the property through the death, or by the bankruptcy of the person possessed of it, can be in no better plight than the person whom they represent would have been, and hold it, if it comes to their hands, in trust for and applicable to the same purposes as he held it, and not as part of the proper estate of the deceased or bankrupt person. As to the following money into land, the Court of Chancery has (as said by Lord *Hardwicke* in the case cited of *Lane v. Dighton and Others*, *Amb.* 409.), been very cautious of doing it, but has done it in some cases. No one, says Lord *Hardwicke*, will say but the Court would do it, if it was actually proved that the money was laid out in land. The doubt with the Court in those cases (he says) has been as to the proof. There is difficulty in admitting proof; parol proof might let in perjury; but it has always been done, (he says) when the fact has been

been admitted in the answer of the person laying it out." There is, therefore, according to Lord *Hardwicke*, who had on that occasion the principal authorities on the subject brought in review before him, no difficulty but in respect of the proof; which difficulty, particularly as arising from the statute of frauds and perjuries, seems to have weighed with Lord *Sommers* and the Master of the Rolls and Mr. *J. Powell* against charging the land in the case of *Kirk v. Webb*, *Prec. in Chan.* 84. No difficulty, however, of that kind in respect to proof, nor any peculiar rules or habits of courts of equity in respect to the charging of land, stand between the original proprietor and his rights in respect to the ascertained produce of his own funds upon this occasion. He has repossessed himself of that, of which, according to the principles established in the cases I have cited, he never ceased to be the lawful proprietor; and having so done we are of opinion, that the assignees cannot in this action recover that which, if an action were brought against them the assignees by the defendant, they could not have effectually retained against him, inasmuch as it was trust property of the defendant, which, as such, did not pass to them under the commission. If this case had rested on the part of the defendant on any supposed adoption and ratification on his part of the act of converting the produce of the draft or bank-notes of the defendant into these *American* certificates, we think, it could not have been well supported on that ground, inasmuch as the defendant, by taking a security by bond and judgment to indemnify himself against the pecuniary loss he had sustained by that very act, must be understood to have disapproved and disallowed that act instead of adopting and

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confirming it; but upon the other grounds above stated, we are of opinion that the defendant is entitled to retain the subjects of the present suit, and of course that a nonsuit must be entered.

Friday,
Feb. 10th.

GABY and Another *against* The WILTS and
BERKS Canal Company.

Where a canal company were empowered to supply the canal with water from all streams whatsoever within the distance of 2000 yards, except as therein after mentioned, with a proviso that nothing should extend to authorize them to

take water from certain specified streams between 10th *June* and 10th *September*, except only that if one of those streams should overflow, the same may be taken into the canal so long as such overflowing shall continue, and that all actions should be brought for any thing to be done in pursuance of the act, or in the execution of the powers and authorities before given, within six calendar months after the fact committed; or in case of a continuation of damages, within three calendar months after the committing such damages shall have ceased: Held that the taking and continuing to take the water by the company from one of the specified streams during the prohibited times, might, nevertheless, be so far a thing done in execution of the powers and authorities given them by the act as to entitle the company to the protection of the act as to the time of commencing the action against them. And therefore an award which found that they did take the water from two of the specified streams, &c. during the prohibited times, and when the other streams did not overflow, and consequently that it was not done in pursuance of the act, or in the execution of its powers and authorities, and therefore not within the protection of the act as to the time of commencing the action, was ill.

(a) By the 35 G. 3. c. 52. the defendants are made a body corporate, and empowered to make a canal, &c., and to supply the same with water from all rivers, springs, brooks, streams, and watercourses whatsoever within the distance of 2000 yards from the canal, (except as hereinafter mentioned), &c. Sect. 8, it is provided and enacted, that nothing in the act shall extend to authorize or empower the company to take or lead into the canal any water whatsoever from out of the
brooks,

of the canal authorized by that act, and more than 6 calendar months before the commencement of the action, the defendants did divert, take into, and use, for the purposes of the canal, between the 10th of June and the 10th of September in 1812 and 1813, divers large quantities of water from and out of the brooks, streams, or rivulets found and being within 2000 yards of the canal, called or known by the name of the *Tokenham Water*, and *Trow-lane Water*, at times when the *Wootton-Basset Brook* did not overflow its banks, and did continue so to take and use such water from and out of the same brooks, streams, or rivulets, called or

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brooks, streams, or rivulets called or known by the name of the *Wootton Basset Brook*, the *Tokenham Water*, and the *Trow-lane Water*, or any of them, at any time or times whatsoever between the 10th of June and the 10th of September in any year; save only and except that if a fall of rain shall occasion the *Wootton Basset Brook* to overflow its banks, the same may be taken into the canal, so long as such overflowing shall continue, but no longer; and that such brooks, streams, and rivulets respectively, shall at all times when they are not to be taken by the company, be suffered to flow in their usual course, or shall be conducted and conveyed in such course by proper culverts, tunnels, and drains, if necessary, by and at the expence of the company. Sect. 144. If any action shall be brought or commenced against any person or persons for any thing to be done by him or them in pursuance of this act, or in the execution of the powers and authorities, or the orders and directions, heretofore given and granted, every such action or suit shall be brought within six calendar months next after the fact committed, or in case there shall be a continuation of damages, then within three calendar months next after the doing or committing of such damage shall have ceased, and not afterwards, and shall be laid or brought in the county where the matter in dispute shall arise, and not elsewhere; and the defendant or defendants in such action or suit shall and may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if it shall appear to have been so done; or if any such action or suit shall be brought after the time hereby limited for bringing the same, or shall be brought in any other county or place than as aforesaid, then and in such case the jury shall find for the defendant or defendants, &c.

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known by the name of the *Tokenham Water*, and *Trow-lane Water*, between the 10th of *June* and the 10th of *September* in the same years, for divers long spaces of time, *all of which expired more than three calendar months next before the commencement of the said action*, and that the plaintiffs have sustained damage by reason thereof to the amount of 15*l.*, the whole of which we consider them entitled to recover, and to have been entitled to recover in the said action, inasmuch as we consider the taking and using, and continuing to take and use, such water from and out of the said last-mentioned brooks, streams or rivulets, between the 10th of *June* and the 10th of *September* in these several years, *to have been prohibited by, and consequently not to have been done in pursuance of the said act, or in the execution of the powers and authorities, or the orders and directions therein given and granted, and therefore not to be within the protection of the 144th section, or any other part of the said act, as to the time of commencing an action for the same,*" &c.

A rule nisi was obtained in the last term for setting aside this award, upon the ground that the action would not lie after the expiration of the time limited by the act of parliament. And the case was likened to *Weller v. Toke* (a), where it was held, that though the act for which the justice was sued could not be said to have been done by virtue of his office, yet as the subject-matter was within his jurisdiction, and he intended to act as a magistrate at the time, however mistakenly, the justice was entitled to the protection of the statute. So here, it was said, the taking the water from streams within 2000 yards of the canal was within the general powers vested in

(a) 9 *East*, 364.

the Company, however mistakenly they may have acted in the time or manner of taking it.

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Burrough, Scarlett, and C. F. Williams, who shewed cause, denied that the taking the water from these particular streams was within the general powers given to the company by the act, for although the act empowers them to supply the canal with water from *all* streams within 2000 yards generally, yet it adds, *except as thereinafter mentioned*, and afterwards goes on to prohibit expressly the taking of the water from these particular streams during a certain season. How then can it be said that the Company who have done that which is expressly prohibited by the act, are nevertheless protected in the doing it by the act; as if that which is expressly forbidden can be said to be within that which is generally allowed? What has been done is not only not in execution of the powers, but is in direct contravention of the act. And therefore there is not any analogy between *Weller v. Toke* and this case, because what the justice there did was in a matter which concerned his *office*, viz. a matter of bastardy, and though he acted mistakenly, still it was done by him, in the words of the stat. 24 G. 2. c. 44., in execution of his *office*. And besides *Weller v. Toke* admits of another distinction, viz. that the 24 G. 2. c. 44. relating to justices of the peace, has been construed liberally, in order to enable the justice to tender amends; but the company in this case could not tender amends. They had not even a colour of right for what they did: and admitting that they had, still the distinction taken by Lord *Kenyon* in *Alcock v. Andrews* (a) between acts

(a) 2 Esp. N. P. C. 542.

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done *virtute officii* and *colore officii*, in the case of a constable would apply to this case. Here the company, in like manner as it was held of the constable in *Milton v. Green (a)*, were bound to know the limits of their authority. And if they could not have given this matter in evidence upon the general issue, which for the above reasons it appears they could not, neither shall the plaintiffs be barred by the limitation of the time of action, because the two provisions are reciprocal. The distinction which must govern this case is plain, that if the defendants in executing their authority happen to overstep it, they shall be protected by the act, but not where they have acted without authority, or rather in contravention of their authority.

Lens Serjt. and *Holroyd*, contra, contended that the question was not whether the defendants were strictly within their authority, but whether they were in the bonâ fide execution of it, according to the best of their judgment. And that this was a matter upon which they were to exercise a judgment they said was apparent from this, that the taking of the water at the times mentioned in the award was not entirely prohibited, but was to depend upon the overflowing of the brook. And therefore if the defendants have exercised their judgment fairly, it matters not whether it be correctly, in order to entitle them to the protection of the act. *Weller v. Toke* is a full authority to that point, for, granting that the defendants were mistaken as to the authority given them by the act, still they acted in a matter not wholly aliene to their authority, inasmuch

(a) 5 East, 233.

as they were authorized to take water from all streams within 2000 yards generally, and even during the prohibited season, if the water of the brook should overflow. And this differs the case from *Milton v. Green*, where the warrant being addressed to a particular district, the moment the constable went out of that district to execute it, he ceased to act as constable, and consistently with Lord *Kenyon's* distinction, became liable, as acting *colore officii*, that is, under pretence of an authority which he had not.

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CHAS. G. WATTS & CO.
WATTS & GUNN
Company.

Lord ELLENBOROUGH C. J. We are called upon to put a general construction on the terms of this act of parliament, and to say whether the thing done by the Company can be considered as so far done in pursuance of the act, or in execution of its powers and authorities, as to be within the limited protection of the act, though what has been done by them is not borne out in its full legality by the course that they have pursued. The legislature, in erecting this Company, invested them with large powers, to supply the canal with water from all rivers, streams, and watercourses whatsoever, within 2000 yards distance of the canal, except as thereafter excepted. They have therefore a general power of taking water from all streams whatsoever within those limits. But their power is subjected to the following exception: "Provided that nothing in this act shall extend to authorize or empower the Company to take or lead into the canal any water whatever from or out of the brooks, streams, or rivulets, called or known by the name of the *Wootton Bassett* brook, the *Tokenham* water and the *Trow-lane* water, or any of them, at any time or times whatsoever, between the 10th of *June* and the

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the 10th of *September* in any year, save only and except that if a fall of rain shall occasion the *Wootton Bassett* brook to overflow its banks, the same may be taken into the canal so long as such overflowing shall continue, but no longer; and that such brooks, streams, and rivulets respectively shall, at all times when they are not to be taken by the Company, be suffered to flow in their usual course," &c. Here is a period pointed out, and certain specified waters, within which period those waters cannot be taken; but at the same time the Company are not wholly precluded from intermeddling with them, because in certain events they have a kind of hazardous authority to take the water from the *Wootton Bassett* brook; that is, whenever a fall of rain shall occasion it to overflow, and so long as it shall continue overflowing. They are therefore to exercise a judgment during the period of interdiction, whether the *Wootton Bassett* brook overflows its banks, or continues to overflow so as to authorize them to take the water. And they have not only that right, but also during the interdicted period when the water is to be suffered to flow in its usual course, it is to be conducted by the Company in such course, if necessary. So that even when they cannot take the water, they are concerned in the conveying it. Suppose then the Company were to make a culvert, or do some act in order to conduct the water in the usual channel of its own stream, could it be said that they would not be doing that in pursuance of the act, and in the execution of its powers and authorities, though in effect they might be contravening its authority. When therefore during the interdicted time they are to exercise a hazardous authority, is it not reasonable that they should be protected so far as in *prosequendo*

to be considered within the act, although in other respects they may be liable for acting in contravention of it. The legislature has not protected them one iota for the excess: all that it has said is, we have given you large powers, and you shall be drawn ad examen speedily. You shall not be visited for your acts after any great lapse of time, for as you are a flux body, what may be just to-day, may not be so at a future period. It might be visiting the transgressions of one set of persons upon the heads of others not connected with the acts. Wherefore the legislature has reasonably, as it seems to me, limited the period of action. And the way in which the stat. 24 Geo. 2. c. 44. was construed by Lord *Kenyon* seems to have been much like the construction we are now giving to this act, for he thought, that if a person does an act within the limits of his official authority, but exercises that authority improperly, or abuses the discretion placed in him, eatenus the statute extends. I do not know precisely what is the difference intended by the legislature between the words "in pursuance of the act," and "in execution of the powers and authorities before given;" but suppose the legislature might mean by the one a more literal pursuance of the act, and by the other when the parties have reason to believe that they are acting in execution of it. That does not apply to a constable, because he has no authority but what he derives from his warrant. A copy of his warrant may be demanded of him, and obedience to it is his defence, and will be his protection under the statute, but he is not to cover himself under it, where the warrant gives him no power, because that would be allowing too much to the ordinary ministers of the law. It appears to me that the clauses of this act were meant to

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to relate to persons entrusted with and in the fair execution of its powers, though they may have done that which the act does not permit, to this extent, that any question touching those powers should be brought to a speedy decision, and no farther. I am therefore of opinion, that the award which finds that the Company did divert and take the water for divers long spaces of time during the excepted period, and that as a necessary consequence it was not done by them in pursuance of the act, or in the execution of its powers and authorities, has drawn and determined upon an inference of law which is not correct.

LE BLANC J. The Court is called upon to put a construction on this statute in a case where by the form of the award the act complained of and found to have been done by the Company is divested of all circumstances which might give it a colour, because the single fact found is, that the Company did take the water between such days and such days, being the period during which they were prohibited from taking it; and therefore it is found that inasmuch as the taking was prohibited by the statute, consequently it was not done in pursuance of it, or in execution of the powers thereby granted. So that the finding on the face of the award is nothing more than a bare conclusion, that being done within the prohibited period, it was consequently not done in pursuance of the act, or in execution of its powers and authorities. Therefore in the present case the Court have no means of seeing in what degree, or under what circumstances, it was done, or whether it was or was not capable of explanation. The award seems formed for the purpose of bringing the question of law directly before

before the Court. The clause of the act is a sort of statute of limitations, prescribing the time within which the Company are to be made answerable for any thing done by them in their corporate capacity. It does not protect them from answering in damages for any act which they may unlawfully commit, but only provides that these damages shall be sued for within a certain time. And there is good reason for this, because as the shares of the Company are continually fluctuating, those persons who were proprietors at the time when the thing was done might not remain proprietors when the action was commenced, if it were not subject to some special limitation. The words of sect. 144. are, "If any action shall be brought against any person for any thing done in pursuance of the act, or in execution of the powers before given, it shall be brought within six calendar months, &c." Now these words cannot possibly be meant of such actions only as are brought for any thing done within the strict jurisdiction of the Company, or in the due execution of their powers, because for such things so done, the Company would not be liable to any action at all; and we cannot suppose that the legislature meant to protect them in such a case alone; they must therefore be meant of such actions as are brought against them for things done, wherein they have offended against the act. The question is not to what extent they have offended, nor whether the Company have done this in such a manner as to clothe themselves with the character of persons conforming in all respects to the authority given them by the act; but whether they have done this wilfully and maliciously. If they did it bona fide, they will be protected as to the time of commencing the action; and unless we so construe the clause,

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clause, it seems to me that we should defeat the intention of it; because in cases where they are clearly within the authority of the act, we cannot suppose it probable that actions would be so frequent as to require the intervention of such a protection. What the circumstances are in which the Company have transgressed, the Court cannot see; they may be malicious, or may not; but as the award is framed, stating only that the Company took water between such and such days, and consequently that the taking was not done in pursuance of the act, or in execution of its powers, if the Court can see any case in which they might notwithstanding be acting under the authority of the act, so as to entitle them to the benefit of the limitation of action, they cannot pronounce that this award has drawn a correct inference.

BAYLEY J. I have had doubts in this case as the argument proceeded, and am not surprized that the arbitrators should have fallen into this mistake, if it be a mistake. It seems to me, however, that the Company ought not to be liable for any thing done in execution of the powers of the act, unless the action be commenced within six months, or in case of the continuation of damage, within three months. The question seems to come to this, whether the Company were acting *bonâ fide*; for if they were not so acting, they are not brought within the protection of the act. If they were acting for the purpose of making or maintaining the canal, I think it was the object of the act to afford them this limited protection. The object was, that for all such things the inquiry should be brought to a speedy trial, and the matters examined recently after they took place. If six or three months were not the time limited, the limitation

limitation would be six years; and then at the expiration of six years the question might come to be tried, whether the Company had taken the water within the prohibited period, and when the *Wootton Bassett* brook did not overflow. One object therefore of the legislature was, that actions which might involve such inquiries should be brought while the damage was recent, and within the knowledge of the parties. Another object was, that the wrong-doers should be the sufferers, inasmuch as the body of proprietors must be a fluctuating body; and therefore that the same persons should be responsible who committed the injury, and not persons who had only become proprietors in the interval.

Rule absolute.

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DUNBAR *against* HITCHCOCK.

Saturday,
Feb. 11th.

IN trespass brought in *C. B.* for an assault and false imprisonment, to which the defendant pleaded not guilty, and at the trial justified under the mutiny act, (52 G. 3. c. 22.) there was a verdict for the defendant, and the Chief Justice, before whom the cause was tried, certified that he allowed the defendant treble costs, this action having been brought for a thing done in pursuance of the mutiny act. The certificate, together with the *postea*, was as usual lodged with the clerk of the judgments, for the purpose of his entering up judgment, who, without taking notice of the certificate, en-

After error from *C. B.* into this court, and from this court into *Dom. Proc.*, this Court allowed an amendment to be made in the record by inserting the certificate of the Judge who tried the cause allowing plaintiff treble costs, which had been omitted by the clerk in entering judgment in *C. B.*; also

by inserting the true term in which the assignment of errors and joinder were made, instead of an entry by the clerk on the judgment roll of this court, that they were made on an impossible day in another term, although both these errors were assigned for cause in *Dom. Proc.*

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tered the judgment for treble costs as if the act of the court, in this form: "Wherefore it is considered by the Court, &c. that the defendant recover against the plaintiff his damages by reason of the premises, to wit, 123*l.* 6*s.* by the discretion of the Justices here to the defendant at his request, for the treble costs and charges by him in that behalf sustained, according to the form of the statute, &c. by the Court here adjudged." Error into this Court; and upon errors assigned and joinder, judgment of affirmance without argument in this Court. And in the entry of this judgment the assignment of errors and joinder were entered upon the roll as of *Monday* next after the morrow of the Purification, in *Michaelmas term*. Afterwards error in Parliament, and the errors assigned were (inter alios) the omission of the certificate in the judgment of *C. B.*, and also in the judgment of affirmance in *K. B.* the entry of the assignment of errors and joinder as of the day above stated, there being no such day. A rule having been obtained for amending these errors by inserting the certificate of the Chief Justice, and altering *Michaelmas* to *Hilary term*,

Pell Serjt. and *Brougham* shewed cause, and as to the first error they did not deny that the Court had jurisdiction to make the amendment, yet they said in this case, where treble costs were to follow by way of penalty, the Court would exercise their discretion sparingly, more especially as it was a gross misprision of the clerk. In 1 *Roll's Abr.* 208. (G.) pl. 2. it is laid down, that "if matter of substance which the clerk ought of himself to have entered be totally omitted, that shall not be amended, otherwise if it be only omitted in part and misentered." And the same rule is to be

be collected from the several instances of amendment put in *Blackmore's* case (a). The amendment in *Stort v. Coffin* (b), which was of a judgment against an executor *de bonis propriis*, by making it *de bonis testatoris si, &c. et si non, &c. de bonis propriis*, was within the above rule, being a misprision of the clerk in the entry of the judgment in a thing which was apparent (c), for it was apparent on the pleadings that the judgment was inapt. And there is this difference between *Petrie v. Han- nay* (d) and the present case, that there the record in which the amendment was allowed was originally a record of this Court; so that the error was begun and attended in the same Court. The statutes of amendment, 14 Ed. 3. stat. 1. c. 6., 8 H. 6. c. 12., and 16 & 17 Car. 2. c. 8., do not aid this case, because they for the most part relate to mere verbal misprisions, or omissions of form; but this is one of substance. And such was the opinion of the Common Pleas, who refused to amend this error upon that ground (e). As to the second error, amendment can only be made after error brought, where diminution may be alleged; but the mis-entry of one term for another is not diminution.

Scarlett, contra, observed, that the Common Pleas would probably not have refused the application upon the first error, if it had been made in the right form, instead of applying to strike out treble costs. And as to the second error, he explained it thus, that this record came into this Court in *Michaelmas* term, and it was only by misprision of the clerk that a continuance to the next term, in which the assignment of errors and

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(a) 8 Rep. 156. (b) 5 Burr. 2730. (c) 8 Rep. 162. h.
(d) 4 Tr. 680. (e) 21 Mod. 800.

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joinder were really made, was not entered on the roll. Therefore alleging the want of such a continuance is alleging diminution which the Court has authority to amend in this case, if it had authority to amend in *Short v. Coffin* and *Petrie v. Hannay*.

LORD ELLENBOROUGH C. J. I find by reference to the minutes of proceedings in this court, that this Court is in the habit of granting leave to make this sort of amendment. I find that it is ordered thus: "Let it be referred to Mr. to amend the record according to the several proceedings in the inferior Court to be *perused* by him." So that it appears in that instance the Court in the exercise of its discretion ordered the materials to be brought before them in order to make the amendment. Whether the transcript be carried to the House of Lords or not, if in this case the amendment is warranted by the statutes of amendments, it is our duty to make such amendment. Certainly this is no greater latitude of amendment than was allowed in *Short v. Coffin*, where the Court thought itself authorized to amend a judgment against an executor by making it *de bonis testatoris* s, &c. instead of *de bonis propriis*, as the mistake of the clerk. This also is the misprision of the clerk in omitting to insert the authority for the Court's allowing treble costs. Any eye acquainted with legal proceedings would see that treble costs were not a part of the ordinary judgment of the Court. A power is given in particular cases; and this amendment is to supply upon the record the certificate of the Judge, who is authorized by a particular statute to allow treble costs. This seems clearly a case of omission which

may be supplied, according to the precedents for amending omissions. In *Petrie v. Hannay* the judgment was entered on one issue only, which certainly was a defective entry, and the Court must have referred to something extrinsic to see if the verdict should not have been entered on all the issues. Here the House of Lords have a defective record; diminution has been alleged, and when it has been amended in this respect, upon being certified into the House of Lords, they will direct the transcript to be amended. It seems to me that this amendment is warranted by the authority of precedents, and by the reason of the thing, as well as the statutes.

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Per Curiam,

Rule absolute.

WILSON and Another *against* KEMP.

Monday,
Feb. 13th.

THE defendant was discharged under stat. 54 G. 3. c. 28., (insolvent debtor's act,) and subsequently to that made a positive promise to pay the debt of which he had been discharged, upon which he was afterwards arrested. And now *Marryat* moved upon an affidavit disclosing these facts, and that the debt accrued before the 6th of November 1813, mentioned in s. 28. of the said act, that he might be discharged upon filing common bail. He urged that s. 28. was precise upon this point, that no person entitled to the benefit of the act should be arrested for any debt due before the day above mentioned. In *Turner v. Schomberg* (a) the very

An insolvent debtor, who has taken the benefit of 54 G. 3. c. 28., is not liable to arrest upon a subsequent promise to pay a debt contracted prior to the day prescribed in the act.

(a) 2 Str. 1232.

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same question arose, and the Court discharged the defendant on common bail, saying it was no new consideration, but the old debt. So, in *Bailey v. Dillon* (a), where a promise was made subsequently to bankruptcy, the debt being prior, the defendant was discharged. And *Trueman v. Fenton* (b), *Besford v. Saunders* (c), and *Lynbury v. Weightman* (d), are not adverse authorities, because they turned only upon the effect of a subsequent promise to revive the debt, but not to enable the party to arrest the defendant.

Holroyd, who shewed cause in the first instance, distinguished *Bailey v. Dillon*, because that being a conditional promise to pay when he was able, the debt was revived only conditionally. And so was the opinion of the majority of the Court in *Besford v. Saunders*. But if there be no condition, and consequently the debt be revived absolutely, as it appears from *Trueman v. Fenton*, and *Lynbury v. Weightman* to be, why should not all the remedies be revived also, and among them the right of holding the party to bail, if the debt be to the proper amount? And in *Tidd's Pract.* (e) it is said, that insolvent debtors, who have been discharged under insolvent acts, may be arrested for prior debts, on subsequent promises to pay them, and *Best v. Barber* is cited as an authority for that.

Lord ELLENBOROUGH C. J. said as the case was of very general extent, the Court would look into the cases, particularly that of *Best v. Barber*.

Cur. adv. vult.

(a) 2 Burr. 736.

(d) 5 Esp. N.P. C. 198.

(b) Cowp. 544.

(c) 2 H. Bl. 116.

(e) 207. 5th edit.

Lord

LORD ELLENBOROUGH C. J. This case was spoken to on *Friday* last, and the Court wished to look into the authority of *Best v. Barber*, which was much relied on. According to the account which we then received of it, we were led to suppose that execution in that case was against the person of the insolvent debtor: but upon referring to two notes taken at the time, one of which was taken by my Brother *Le Blanc*, we find that it was a motion to set aside an execution against the goods, and not against the person of the debtor, so that the question did not properly arise. If that decision is removed out of the way, and we look to the other case of *Bailey v. Dillon*, we find that Lord *Mansfield* there held the party ought not to be arrested, and afterwards the Court of Common Pleas, in the absence of *De Grey* C. J., were of the same opinion (a). In addition to this, we find the language of the 28th section extremely strong; it is this: "that no person entitled to the benefit of this act shall hereafter be imprisoned by reason of any debt contracted, incurred, occasioned, owing, or growing due, before the said 6th day of *November* 1813." The word "occasioned" is of very large import, including both the consideration and the promise. We think, therefore, in furtherance of the clear object of the act of parliament the defendant should not be held to bail upon this promise, although it may lay the foundation for an action.

1815-

 WILSON
 against
 Kemp.

LE BLANC J. The case of *Best v. Barber* was upon the motion of Mr. *Mingay* to set aside an execution against the goods, and opposed by Mr. *Erskine*. It

(a) See 2 Bl. R. 799, *Ford v. Chilton*.

1815.

WILSON
against
HEMP.

appears from my note, as well as from that of a gentleman at the bar, now no more, that the execution was against the goods, and not against the person.

Per Curiam,

Rule absolute.

END OF HILARY TERM.

AN

I N D E X

TO THE

PRINCIPAL MATTERS.

ABATEMENT.

THE plaintiff cannot sign judgment after a plea in abatement, because the affidavit to verify the plea was sworn before the defendant's attorney. *Horsfall v. Matthewman*, T. 54 G. 3. Page 154

ACTION UPON THE CASE.

An action upon the case was held not to lie against the vicar-general of the bishop for excommunicating plaintiff with the greater excommunication, for contumacy, in not taking upon him administration of an intestate's effects, to whom plaintiff was next of kin, and had intermeddled with the goods, &c. although the citation by which plaintiff was cited was void, by reason that it required him to appear and take administration, &c. without leaving him an option to renounce it, and the proceedings thereupon had been set aside upon appeal; for the vicar-general had jurisdiction over the subject-matter, viz. the granting administration, and there was no malice. *Ackerley v. Parkinson and Another*, H. 55 G. 3. 411

ADMINISTRATION.

See ACTION ON THE CASE.

AFFIDAVIT.

See ABATEMENT. PRACTICE, 8.

1. An affidavit of debt not entitled in any court, and only with the words *By the Court* written at the bottom of the jurat, is not sufficient. *Molling v. Poland*, T. 54 G. 3. Page 157
2. In an affidavit to hold to bail, if the deponent be described as "of the city of London, merchant," it is sufficient. *Vaissier v. Alderson*, M. 55 G. 3. 165
3. Affidavit to hold to bail, "that *R. Sutton* is indebted to plaintiff for money paid and laid out to the use of the said *R. Jackson*," held well enough. *Hughes v. Sutton*, M. 55 G. 3. 178
4. Affidavits in answer to a rule for a mandamus sworn before a commissioner must contain the place where sworn, otherwise they cannot be read. *The King v. The Justices of the West Riding of Yorkshire*, H. 55 G. 3. 493

AGREEMENT.

An agreement by defendant to allow plaintiff, with whom he cohabited, in case they should separate, an annuity for her life, provided she should continue single, was held a valid agreement. *Gibson v. Dickie*, H. 55 G. 3. Page 463

AMENDMENT.

1. Defendant served with a copy of a latitat in a penal action by a wrong name, and declaration filed conditionally by the same name, to which defendant appeared and pleaded a misnomer. Held that a Judge's order to amend the bill and declaration by substituting the true name was good, and that after such amendment there was no irregularity. *Mestaer and Another, q. t. &c. v. Hertz*, H. 55 G. 3. 450
2. After error from C. B. into this court, and from this court into Dom. Proc., this court allowed an amendment to be made in the record by inserting the certificate of the Judge who tried the cause, allowing the plaintiffs treble costs, which had been omitted by the clerk in entering judgment in C. B.; also by inserting the true term in which the assignment of errors and joinder were made, instead of an entry by the clerk on the judgment roll of this court, that they were made on an impossible day in another term, although both these errors were assigned for cause in Dom. Proc. *Dunbar v. Hitchcock*, H. 55 G. 3. 591

ANNUITY,

See PLEADING, 1.

APPEAL,

See CONVICTION. WITNESS, 2.

1. By 51 G. 3. a. 61. (inclosure act,) the party aggrieved by any thing

done in pursuance of the act may appeal to the quarter sessions within six calendar months after the cause of complaint. The commissioners in 1812 made an allotment, upon the map to the vicar in lieu of his tithes, which the vicar inspected at a meeting held November 1812, and appointed an agent, who attended a subsequent meeting, when an alteration was made in the map, which the agent approved, and it was understood that all objections to the vicar's allotments were reconciled; in November 1813 the commissioners gave notice that they had ordered all tithes, &c. to cease from the 29th of September then last: Held that the vicar was not out of time to appeal to the next quarter sessions after that notice. *The King v. The Justices of Gloucestershire*, T. 54 G. 3. Page 127

2. If two justices make an order for diverting and turning a public footway, and afterwards an order for stopping up the old footway, the party grieved may appeal to the quarter sessions against the last order, though he be too late to appeal against the first. *The King v. The Justices of Hertfordshire*, H. 55 G. 3. 459

APPRENTICE,

See ASSUMPSIT, 1. SETTLEMENT BY HIRING AND SERVICE, 4.

1. The stat. 5 Eliz. c. 4. relates only to such persons who bind themselves as apprentices as are under age, and not to adults. *Smedley v. Gooden*, M. 55 G. 3. 189
2. It seems that contracts of apprenticeship which are voidable, are not avoided by the apprentice's absenting himself from the service. *ib.*

ARREST,

ASSUMPSIT.

ARREST,

See CONSUL. DISCONTINUANCE.
INSOLVENT DEBTOR.

ASSIGNEE,

See POWER.

ASSIGNMENT,

See COPY-RIGHT. LANDLORD AND
TENANT.

Where G. a debtor to plaintiff, being sued by plaintiff, pending the suit and before execution, being insolvent, executed an assignment of all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken: Held that the assignment was not fraudulent within stat. 13 *Eliz. c. 5.* although made to the intent to delay the plaintiff of his execution. *Pickstock v. Lyster, H. 55 G. 3.* Page 571

ASSUMPSIT.

1. Where the plaintiff's apprentice deserted from the plaintiff's ship, and went on board the defendant's, and secreted himself until the defendant's ship sailed, when he discovered himself to the defendant, who carried him to H., to which place he worked his passage, receiving his food, and during their passage to H. the plaintiff's and defendant's ship were within hail, but defendant did not make known to plaintiff that he had the apprentice on board, and on the arrival of defendant's ship at H. the apprentice wished to leave her, but defendant persuaded him to remain, promising him either wages or clothes and pocket-money, under which persuasion the apprentice sailed with him to E., and did duty as one of the crew, but received no wages, or clothes, or pocket-money: Held, that plain-

ATTACHMENT.

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tiff was entitled to waive the tort, and bring assumpsit against defendant for the work and labour of his apprentice, and to recover a reasonable compensation for the services of the apprentice from H. to E. *Foster v. Stewart, M. 55 G. 3.* Page 191

2. Where a number of persons made subscriptions, and formed themselves into a company for brewing ale, &c. and entered into a deed, by which it was agreed that the conduct of the business should be confided to two persons, and the trade carried on in their names, and that they should be trustees for the company so far that the right of action for goods delivered should be in them, and all actions for ale, &c. delivered should be brought in their names, and all ale, &c. delivered should be considered as their property, &c. and that the directors for the time being should have power to regulate the general business of the company, and that general quarterly meetings of the members should be holden: Held, that one person only could not be appointed at a general quarterly meeting, upon the recommendation of the directors, to conduct the business in place of the two persons originally appointed under the deed, unless such alteration was made by the consent of, or after notice to all the subscribers, and therefore plaintiff, who had been so appointed without the consent of or notice to defendant, who was an original subscriber and executed the deed, could not maintain assumpsit for ale of the company delivered to defendant. *Davies v. Hawkins, H. 55 G. 3.* 488

ATTACHMENT,

See BAIL, 3. PRACTICE, 8.

AVER-

AVERAGE, GENERAL.

Where a ship in the course of her voyage was run foul of by another ship and damaged, and the captain was in consequence obliged to cut away part of the rigging and to return to port to repair the damage and cutting away, without which the ship could not have prosecuted her voyage, or safely kept the sea: Held that the expences of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no further, and of unloading the goods for the purpose of making the repairs, were a general average. Secus the master's expences during the unloading, repairing, and reloading, and crimpage to replace deserters during the repairs. *Plummer and Others v. Wildman*, H. 55 G. 3. Page 482

AWARD,

See PLEADING, 3.

Submission to two, so as they made their award on or before a day certain, but if they do not by the time aforesaid make their award, then to an umpire, provided he make his award on or before a subsequent day, the arbitrators finally disagree before their time expires, and declare they will not make any award, and do not make any: Held that the umpirage might be made, after the final disagreement of the arbitrators, before the time allowed them had expired. *Smailes v. Wright*, H. 55 G. 3. 559

BAIL.

1. A defendant who has put in bail, and rendered in their discharge, is entitled to have the money deposited in the hands of the sheriff in lieu of bail, repaid to him under

BANKRUPT.

- stat. 43 G. 3. c. 46. s. 2. *Chadwick v. Batty*, M. 55 G. 3. Page 283
2. Upon removal of a cause by certiorari out of the court of the honour of Gloucester, the pledges below are discharged by putting in and perfecting bail above. *Taylor v. Shapland and Another*, M. 55 G. 3. Page 328
 3. If bail be put in in the county where the defendant is arrested upon a testatum capias, it is not a nullity if the county whence the testatum issued appear in the margin of the bail-piece, and an attachment shall not go against the sheriff. *The King v. The Sheriff of Middlesex, in a Cause of Bridges v. Smith*, H. 55 G. 3. 531

BANKRUPT,

See COSTS, 6. LANDLORD AND TENANT.

1. The proving a debt under a commission of bankruptcy, issued against a person who had before compounded with his creditors, and whose estate under the commission had not, nor would, produce 15s. in the pound, but who, before he became bankrupt, paid the creditors with whom he compounded, the full amount of their debts, was held to discharge the bankrupt in respect of his future estate and effects from an action for the debt so proved. *Read v. Sowerby*, T. 54 G. 3. 78
2. It seems that the proving a debt under a commission, is an election by the creditor, within the stat. 49 G. 3. c. 121. s. 14. which deprives him of his remedy by action against the bankrupt in the cases excepted in stat. 5 G. 2. c. 30. s. 9. *ib.*
3. The drawer of a bill of exchange, who has paid the amount to the holder after a commission of bankruptcy issued against the acceptor, may sue the acceptor, before he has

BARON AND FEME.

has obtained his certificate, and arrest him upon the bill, notwithstanding the holder has proved the bill under the commission. *Mead v. Braham*, T. 54 G. 3. Page 91

4. A debt due to two partners is good to support a commission of bankruptcy, notwithstanding one of the partners is resident in an enemy's country, such residence not being shewn to be an adhering to the enemy. *Roberts v. Hardy, Walker, and Others*, H. 55 G. 3.

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5. Where a draft for money was entrusted to a broker to buy exchange bills for his principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds: Held that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money. *Taylor and Another, Assignees of Walsh, a Bankrupt, v. Sir Thomas Plumer*, H. 55 G. 3.

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BARON AND FEME.

Ejectment against a feme sole who married before trial, and verdict and judgment against her by her original name: Held that it was regular to issue an habere facias possessionem, and fi. fa. against her by the same name, though the fi. fa. was inoperative. *Doe, on the dem. of Taggart, v. Sarah Butcher*, H. 55 G. 3.

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BILLS OF EXCHANGE, &c. 603

BILLS OF EXCHANGE AND PROMISSORY NOTES,

See BANKRUPT, 3. PLEADING, 5. 8. PRACTICE, 2.

1. Where the drawer of a bill payable to his own order, and indorsed by him to T., and by T. to B., upon the bill being dishonoured, paid the amount to B., who struck out his own and T.'s indorsement, and returned it to the drawer, and the drawer afterwards passed it to the plaintiff: Held that the plaintiff might recover against the acceptor. *Callow v. Lawrence*, T. 54 G. 3.

Page 95

2. The Court referred it to the master to see what was due for principal and interest on a bill of exchange, upon the production of a copy of the bill verified by affidavit of the plaintiff's attorney, the original having been stolen out of his pocket, and no tidings of it gained. *Brown and Others v. Messiter*, M. 55 G. 3.
3. Where the holder of a bill of exchange upon its being dishonoured received part payment, and for the residue another bill of exchange, drawn and accepted by persons not parties to the original bill, and afterwards sued the drawer and acceptor upon the original bill: Held that it was sufficient for him to prove presentment of the substituted bill to the acceptor for payment, and that it was dishonoured, without proving that he gave notice of the dishonour to the drawer of the substituted bill. *Bishop v. Rowe. Same v. Bayly*, H. 55 G. 3.

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BOND,

See INQUIRY, WRIT OF. PLEADING, 7. 9, 10.

BRIDGE.

BRIDGE.

Where certain persons and their successors were authorized, by act of parliament, to make a river navigable, and to cut the soil of any persons for making any new channel, &c. by virtue of which they cut through a highway, and rendered it impassable, and a bridge was built over the cut over which the public passed, and which had been repaired by the proprietors of the navigation: Held that the proprietors, and not the county, were liable to repair. *The King v. Kerrison*, H. 55 G. 3. Page 526

BRITISH ALE BREWERY,

See ASSUMPSIT, 2.

BROKER,

See BANKRUPT, 5.

CERTIORARI,

See BAIL, 2.

Upon indictment against a parish for not repairing a highway, the right to repair may come in question, so as to entitle the parish to remove it by certiorari, though the parish plead not guilty only. *The King, on the Prosecution of Kimberley and five Others, v. The Inhabitants of Townton St. Mary*, H. 55 G. 3.

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CHARITABLE USES.

A grant by deed executed and inrolled pursuant to the statute of Mortmain of lands to trustees and their heirs, to the use of one of them, his heirs and assigns, upon condition that he, his heirs and assigns, should from time to time, repair a vault and tomb, standing upon part of the lands, and if need be rebuild it, and permit the same to be used as a family vault for the grantor and any of her family, and

COMMITMENT.

in default thereof, then over to the other trustee, his heirs and assigns, was held not to be within the words of the statute, which prohibit the granting of lands, &c. to charitable uses unless the deed be without any condition or reservation for the benefit of the grantor, or any person claiming under him. *Doe, dem. Thompson, v. Pitcher and Others*, H. 55 G. 3. Page 407

CHARTER-PARTY,

See COVENANT, 1, 2. LIEN, 2. RELEASE.

COMMISSIONERS,

See SEWERS, COMMISSIONERS OF. WITNESS, 2.

COMMITMENT,

See WITNESS, 1.

1. A warrant of two justices, committing the collector of the rates for the parish of *Richmond* to the county gaol, upon complaint against him for refusing to account and pay over the monies collected by him, adjudging that he should be committed to the gaol, there to remain until he should have made a true account, and until such money as upon the said account should appear to be remaining in his hands, should be paid by him or his sureties, was held well, although it concluded by directing the gaoler to keep him until he should be discharged by the course of law. *George Ogden, v. M.* 55 G. 3. Page 203
2. A commitment for non-payment of a penalty upon conviction under stat. 10 G. 3. c. 18., (dog-stealing act,) which penalty is to be paid, half to the informer and half to the poor of the parish where the offence is committed, is good, if it shew

shew who the informer is and what the parish, although upon the conviction, as it is recited in the commitment, *the informer is not named*, and the justices only adjudge the penalty *to be applied in such manner as the law directs*. *The King v. Helps*, M. 55 G. 3. Page 331

3. The justices need not upon the conviction adjudge that if the penalty be not forthwith paid, the offender shall be committed, &c. but may, after affirmance of the conviction upon appeal, commit the offender for refusing to pay the penalty. *ib.*

COMPANY,

See ASSUMPSIT, 2.

CONSPIRACY,

See INDICTMENT, 2. NEW TRIAL.

CONSUL.

A resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempted from arrest upon mesne process. *Vivash and Another v. Becker*; and *Divett v. Same*, M. 55 G. 3. 284

CONVICTION.

Upon a conviction by two justices for an offence against stat. 17 G. 3. c. 56. s. 14., if the justices at the time of such conviction make known to the party convicted his right to appeal, and he declines appealing, they need not go on to inform him of the necessary steps to be taken in order to appeal. *The King v. The Justices of the West Riding of Yorkshire*, H. 55 G. 3. 493

COPYRIGHT.

An assignment of copyright of a song must be in writing, in order

to entitle the assignee to maintain an action on the case for pirating it. *Power v. Walker*, T. 54 G. 3. Page 7

CORPORATION,

See MANDAMUS.

The stat. 31 G. 3. c. 58. does not bind an officer of a corporation, having the custody of the records, to permit any member of the corporation to inspect the order for the admission and swearing in of the freemen, &c. of the corporation; and, therefore, where the town-clerk offered to permit an inspection of the entries made upon stamps, of the admission and swearing in of burgesses, but refused an inspection of the common-council-book, in which it was usual to enter the order for the admission and swearing in of the burgesses. Held that he did not thereby incur a penalty. *Davies v. Humphreys*, M. 55 G. 3. 223

COSTS,

See DISCONTINUANCE. INQUIRY, WRIT OF. PRACTICE, 7.

1. Expences of a person sent to inquire after the subscribing witnesses to a bond not allowed in the taxation of costs. *Laing v. Bowes*, T. 54 G. 3. 89
2. Parish officers, or persons acting on their behalf, are not entitled, under stat. 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12., to double costs upon judgment as in case of a non-suit in an action brought against them for the price of goods sold and delivered to them for the use of the poor. *Blanchard v. Bramble*, T. 54 G. 3. 131
3. A plaintiff who has lain in prison more than 12 months under an execution for the costs of a non-suit, not amounting to 20s. is entitled to

- to be discharged under 48 G. 3. c. 123. *Roylance v. Hewling, M. 55 G. 3.* Page 282
4. The Court will not grant a rule that the plaintiff may give security for costs, unless application has been made to him to give security. *Bass v. Clive, M. 55 G. 3.* 283
5. By 51 G. 3. c. 30. (inclosure act,) "any person dissatisfied with the determination of the commissioners may bring an action against the person in whose favour such determination shall have been made, and if it shall appear that the party claiming is entitled to a qualified or less interest, the jury may declare the same on their verdict, to be indorsed on the postea, in addition to the verdict given on the issue joined, but the costs of such action shall abide and be determined by the verdict given upon the issue joined;" and action brought against defendant for claiming right of common in respect of 91 acres, and upon the general issue, the declaration, consisting only of one count, verdict for plaintiff as to 30 acres, and for defendant for the residue, and indorsement on the postea that jury find the right of common in respect of 60 acres, &c.: Held that plaintiff was entitled to general costs. *Durham v. The Marquis of Hertford, M. 55 G. 3.* 323
6. Where plaintiff sued defendant for a debt before the bankruptcy of defendant, and went on with the suit after his bankruptcy, and had judgment, and defendant obtained his certificate, and afterwards brought a writ of error, which was non-prossed, and costs of non-pros. in error awarded against him: Held that the defendant was discharged by his certificate from these costs. *Scott and Another v. Ambrose, M. 55 G. 3.* 326

7. Several persons were held entitled to costs under stat. 5 W. & M. c. 11. as prosecutors of an indictment, removed by certiorari, for not repairing a highway, one as constable of the manor within which the highway lay, the others as parties grieved, they having used the way for many years in passing and re-passing from their homes to the next market-town, and being obliged, by reason of the want of repair, to take a more circuitous route. *The King, on the Prosecution of Kimberley and five Others, v. The Inhabitants of Taunton St. Mary, H. 55 G. 3.* Page 465

COVENANT,

See LIEN, 2.

1. The charterer of a ship, who covenants to send a cargo alongside at a foreign port, is not excused from sending it alongside, though in consequence of the prevalence of an infectious disorder at the port all public intercourse is prohibited by the law at the port, and though he could not have communication without danger of contracting and communicating the disorder; therefore where to covenant for not sending a cargo alongside at Gibraltar, defendant pleaded that a pestilent and infectious disorder prevailed there, and therefore all intercourse was prohibited by the law of the place, and became impracticable, without imminent danger to the persons concerned of contracting and communicating the same, and defendant was prevented from sending alongside during all that time, of which plaintiff had notice, and thereupon departed with his ship on her return: replication, that defendant might have sent the cargo alongside before all intercourse became unlawful or impracticable, but refused; and thereupon plaintiff

DEBT.

plaintiff departed with his ship by the consent of defendant's agent: Held that defendant was liable. *Barker v. Hodgson*, M. 55 G. 3.

Page 267

2. Where by charter-party between the ship-owner and freighters, the ship-owner covenanted to proceed from *L.* to *Naples*, and there make a right and true delivery of the outward cargo, and *having so done* receive on board a return cargo, restraint of princes, &c. excepted, and the freighters covenanted in consideration of the premises that at *N.* they would find and provide, *as they did warrant and assure to the ship-owner*, a full and complete return cargo, &c. and that 175*ol.* should be paid on delivery of the outward cargo, which should be considered as earned for outward freight: Held that in covenant against the freighters for not providing a return cargo at *N.* they could not plead in excuse of performance that the outward cargo was seized by the government at *N.* and never delivered to them; for the delivery of the outward cargo was not a condition precedent to the providing a return cargo: but the delivery of the outward cargo was a condition precedent to the payment of the 175*ol.*, and therefore a breach assigned for non-payment thereof was under these circumstances not sustainable. *Storer v. Gordon and Others*, M. 55 G. 3.

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DEBT,

See CORPORATION. VENUE.

Debt for rent, without shewing in what parish the lands were situate, and a particular of plaintiff's demand, describing them in a wrong parish, yet it was held, that plaintiff might recover, it not appearing that any misrepresentation was

DEVISE.

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intended, or that defendant held more than one parcel of land of plaintiff so as to be misled by it. *Davies v. Edwards*, H. 55 G. 3.

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DESERTER, .

See JUSTICES, 2.

DETAINER,

See PRACTICE, 3.

DEVISE,

See EVIDENCE, 1. POWER.

1. Devise of all testatrix's real estates to the use of *B. F.*, the husband of her niece, for life, and from and immediately after his decease, then to and to the use of the 2d, 3d, 4th, and all and every other the son and sons of the body of *B. F.* by his said wife (except the first or eldest son) severally, and successively, and in remainder one after another, and of the several heirs male of the body of every such son and sons (except the said first or eldest son); and for default of such issue, to the use of *F. S.*, youngest son of another niece of the testatrix, for life, &c.: Held that the remainder to the sons of *B. F.* (who had no children at the date of the will,) was not a contingent remainder to such son as should be the second son of *B. F.* at the death of *B. F.*, nor a vested remainder in the second or other son of *B. F.* liable to be divested by his becoming the first or eldest, by the death of his elder brother in the lifetime of *B. F.*, but a vested indefeasible remainder in the second or other son of *B. F.* who should be born living an elder; and therefore *B. F.* having had four sons, of whom the 2d and 3d, and 2d and 4th, were in existence at the same time, but all, except the 4th, died in the life-

lifetime of *B. F.* without issue, held that the surviving son was entitled under the devise. *Driver ex dem. Frank v. Frank*, T. 54 G. 3. Page 25

2. Devise of lands to trustees and their heirs in trust to the use of *W. B. B.* and his first and other sons in strict settlement, remainder to *J. B.* and his first and other sons in strict settlement, with power to the trustees from time to time during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any lease of all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent, &c.: Held that a lease by *W. B. B.* of part of the lands devised, in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised, at one entire rent, viz. the ancient rent for that part which had been anciently demised, was void, for the whole of the lands included in that parcel, as well the lands never before let as those anciently let: but it seems to be good as to the other parcels, which contained only lands anciently demised, and on each of which there was a several reservation of the ancient rent. *Doc. on dem. of Edw. Freeman Bartlett, v. Rendle and Others*, T. 54 G. 3. 99

3. The testator being tenant of copyhold premises at *Crondall*, under four several admissions to the use of himself for life, and of such person as he should appoint, and in default of appointment to the use of himself in fee, subject to certain quit rents, and being seised and possessed of other real estates in *Great Britain and Ireland*, and of a leasehold estate held under two leases at *Blansby*, devised his whole real estate in lands in *Great Britain or Ireland*, to his wife for

life, and after her death to be divided between his two nephews and their respective issue; and in default of such issue to be divided between the children of his nieces, &c.; and by codicil reciting that he had ordered all his estate in *Great Britain and Ireland*, after the decease of his nephews without issue, to be divided, &c. he revoked the same, and before that division devised his whole real estate to *B.* and his heirs male, &c. and devised his two leases, with the quit rents of his lands in *Crondall* and in *Blansby* to *B.* after his wife's decease: Held that *B.*, after the wife's death, took a fee in the copyhold premises. *J. R. Cutbert v. P. R. Lempriere*, T. 54 G. 3. Page 158

4. Devise of all my lands at *H.* to *J. M.*, my cousin and heir at law, his heirs and assigns for ever, provided that he or his heirs do, within six months after my decease, assure to *R. M.* and to his children the copyhold premises at *R.*, and in default thereof to *R. M.* for life, and from and after his decease to his children living at the time of his decease, their heirs and assigns for ever, as tenants in common: *J. M.* and *R. M.* died unmarried before the deviser: Held that this was not a lapsed devise of the whole interest, so as to belong to the heir at law of the deviser, but by reason of the contingent interest which remained undisposed of, if *J. M.* should not assure, and *R. M.* should die without children, the residuary devisees, to whom was devised all the rest of the deviser's lands, &c. wheresoever situate, &c. were entitled. *Doe d. Wells and Others v. Scott and Another*, M. 55 G. 3. 300
5. Devise of testator's house and garden to *W. L.*, with all his stock, book-debts, household goods and fur-

EVIDENCE.

furniture thereto belonging, after payment of his debts, legacies, &c., only passes an estate for life. *Doe dem. Jackson v. Ramsbotham*, H. 55 G. 3. Page 516

6. Devise of "all my lands in T. to A. B. during her natural life, and after her death to T. B., his heirs and assigns, and for want of heirs begotten by T. B. to M. B. and E. B., except 20l. to be paid out of E's part of the lands to M. B. Held that M. and E. B. took only for life. *Roe d. Peter and Elizabeth his Wife v. Daw*, H. 55 G. 3. 518

DISCONTINUANCE.

A discontinuance of a former action is not complete so as to entitle the plaintiff to arrest the defendant upon a fresh writ, until the plaintiff has taxed the costs. *Molling and Others, Assignees of White and Lubben, Bankrupts, v. Buckholtz*, T. 54 G. 3. 153

DISTRESS,

See VARIANCE, 2.

DRAINS,

See SEWERS, Commissioners of.

EMBEZZLEMENT,

See INDICTMENT, 4.

ENEMY'S COUNTRY, *Residence in*,

See BANKRUPT, 4.

ENTRY,

See FINE.

EVIDENCE,

See BILLS OF EXCHANGE, 3. VARIANCE. WITNESS, 2.

1. Devise of "all the estate and interest whatsoever which I have or
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FINE.

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can claim, either in possession or reversion, of or in any lands, tenements, and hereditaments at Coscomb:" Held that evidence was not admissible that another estate, not at Coscomb, was formerly united and had been ever since enjoyed with the estate at Coscomb, in order to shew that it passed under the devise. *Doe dem. Browne v. Greening*, M. 55 G. 3. Page 171.

2. In case against the sheriff for a false return of nulla bona, an inquisition taken by him to ascertain the property of the goods taken under the fi. fa. finding them to be the property of a third person, not the defendant in the execution, is not admissible evidence for the sheriff. *Glossop v. Pale*, M. 55 G. 3. 175.

EXAMINATION,

See ACTION ON THE CASE.

EXECUTION,

See BARON AND FEME, COSTS, 3.

FACTOR,

See MONEY HAD AND RECEIVED.

FEME COVERT,

See BARON AND FEME. JUSTICE, 2.

FINE.

Tenant for life, remainder to R. P. in fee, and tenant for life leases for her life and dies in 1799, and leases continues in possession without paying rent till his death in 1805, when his son takes possession, and continues without paying rent, and in 1807 levies a fine with proclamations: Held that the heir of R. P., the remainder-man, might maintain ejectment against the son without an actual entry to avoid the fine.

fine, or a notice to determine the tenancy. *Doe dem. Burrell v. Perkins*, M. 55 G. 3. Page 271

FRAUDS, *Statute of.*

A contract for the purchase of a quantity of oak pins for the price of upwards of 10*l.*, which were not then made, but were to be cut out of slabs and delivered to the buyer, was held not to be within sect. 17. of the statute of frauds. *Groves v. Buck*, M. 55 G. 3. 178

FRAUDULENT CONVEYANCE,

See ASSIGNMENT.

FREIGHT,

See COVENANT, 1, 2. LIEN, 2.

GENERAL AVERAGE,

See AVERAGE.

HABEAS CORPUS,

See COMMITMENT.

HIGHWAY,

See CERTIORARI. COSTS, 7.

ILLEGAL VOYAGE,

See SOUTH SEA COMPANY.

INCLOSURE ACT,

See COSTS, 5.

INDICTMENT,

See BRIDGE. CERTIORARI. COSTS, 7. NEW TRIAL.

1. Indictment against defendant, who was employed to make bread for the military asylum, which charged that he delivered to J. H. divers (fl.) 297 loaves, as for good household bread, for the use and supply of the said asylum and the children belonging thereto, whereas the said loaves were not good household bread, but contained divers noxious and unwholesome materials,

not fit for the food of man, was held sufficiently certain without shewing what the noxious materials were, or that the defendant intended to injure the children's health. Mixing alum with bread in such manner as that crude lumps were found in the bread, was holden to be indictable. *The King v. John Dixon*, T. 54 G. 3. Page 11

2. It was held an indictable offence to conspire on a particular day by false rumours to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day, and that the indictment was well enough without specifying the particular persons who purchased, as the persons intended to be injured, and that the public government funds of this kingdom might mean either *British* or *Irish* funds, which since the Union were each a part of the funds of the United Kingdom. *The King v. De Berenger and Others*, T. 54 G. 3. 67

3. The Court will take judicial notice that a war exists between this country and a foreign state, which war is recognized in different acts of parliament, and therefore an allegation to that effect need not be proved. *ib.*

4. In an indictment upon 39 G. 3. c. 85. for embezzling bank-notes, it is a sufficient description of the notes to say, divers, to wit, nine bank-notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of 9*l.*, and of the value of 9*l.*: and if in the body of the indictment it be alleged that the defendant received them as clerk on account of his employers, and feloniously embezzled the same, the indictment may conclude "and so the defendant did feloniously steal, take, and carry away the bank-notes," laying

laying them to be the property of his employers; for that is the statutable conclusion from the facts alleged in the body of the indictment. *The King v. Johnson*, H. 55 G. 3.

Page 539

5. A count for embezzling bank-notes upon the statute may be joined with a count for larceny. *ib.*

INFANT,

See PLEADING, 9.

INFERIOR COURT,

See PRACTICE, 1.

INQUIRY, *Writ of.*

In debt upon a replevin bond, assigning for breach the not making a return of the goods distrained for rent, the plaintiff may, after signing judgment against the defendant for not returning the demurrer-book, tax the costs and issue execution for the costs, and the amount of the goods distrained as indorsed on the replevin-bond, without executing a writ of inquiry. *Middleton v. Bryan*, T. 54 G. 3.

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INSOLVENT DEBTOR.

An insolvent debtor, who has taken the benefit of 54 G. 3. c. 28., is not liable to arrest upon a subsequent promise to pay a debt contracted prior to the day prescribed in the act. *Wilson v. Kemp*, H. 55 G. 3.

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INSURANCE.

1. A licence granted upon the representation of *W. V.* on behalf of different *British* merchants for permitting a ship (by name) to proceed under any colours, except the *French*, with a cargo of such goods as were permitted by an order in council to be exported from *London* to any ports within certain limits, the whole of the country

within those limits being in hostility with this country, was held to protect the property of an alien enemy residing in the hostile country, shipped on his account in this country; and therefore an insurance for his benefit was held legal. *Hullman and Another v. Whitmore-Same v. Scott*, H. 55 G. 3. Page 337

2. A policy of assurance on freight and goods, per ship named, at and from *Portneuf* to *London*, warranted to sail on or before the 28th of October, and on the 26th the ship dropped down from *Portneuf* with an incomplete crew for the voyage, and on the 28th reached *Quebec*, which was the nearest place where she could obtain a clearance, and there completed her crew, and on the 29th obtained her clearance, and sailed the next day: Held that the dropping down from *Portneuf* to *Quebec* on the 26th was not a compliance with the warranty. *Ridsdale v. Newnham*, H. 55 G. 3.

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3. Policy of assurance on ship at and from *Memel* to the ship's port of discharge in *England*, warranted to depart on or before a particular day: Held that this warranty required not only that the ship should set sail on the voyage, but that she should be out of the port on or before the day; and therefore where she set sail on the voyage before the day, but was detained within the harbour by adverse winds until after the day, this was not a compliance with the warranty. *Moir v. The Royal Exchange Assurance Company*, H. 55 G. 3.

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JOINDER.

A count for embezzling bank-notes upon the statute may be joined with a count for larceny. *The King v. Johnson*, H. 55 G. 3. 539

S s 2

JUDG-

JUDGMENT,
See ABATEMENT.

JUSTICES,

See APPEAL, 2.

1. A justice of the peace may commit a felon covert who is a material witness, upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennet and Wife v. Watson and Another*, T. 54 G. 3. Page 1
2. A justice before whom a deserter is brought and committed to the county gaol, may, if the deserter is unable to bear the charges himself, direct the expences of conveying him thither to be paid, by the treasurer of the county, to the constable of the parish who found and apprehended him in the parish, and conveyed him to the gaol. *The King v. Pierce*, T. 54 G. 3. 62

LANDLORD AND TENANT,

See DEBT.

1. Demise for years to S., and S. covenants that he, his executors, administrators, or assigns, would not assign the indenture, or his or their interest therein, or assign the premises to any person whatsoever, without consent in writing of lessor. Proviso, that in case S., his executors, administrators, or assigns, should part with his or their interest contrary to his covenant that lessor might re-enter. S. deposited the lease as a security for money borrowed, and became bankrupt, and the lease was sold by direction of the Chancellor to pay that debt: Held that the assignees under the commission might assign the lease to the vendee without consent of the lessor. *Doe*

dem. Goodbehere v. Bevan, H. 55 G. 3. Page 353

2. Tenant may shew his landlord's title at an end, in ejectment brought against him by the landlord. *Doe d. Jackson v. Ramsbotham*, H. 55 G. 3. 516

LARCENY,

See INDICTMENT, 4, 5.

LEASE,

See DEVISE, 2. LANDLORD AND TENANT. POWER, 1. SETTLEMENT BY TENEMENT OF 104. A YEAR, 1.

LICENCE,

See INSURANCE, 1.

It seems that under a deputation from the commissioners of stamps, authorizing H. and S., collectors of the post-horse duties, to grant licences to persons to let post-horses, a licence by H. for S. and self is well enough. *Smith and Another q. t., &c. v. Moss*, T. 54 G. 3. 15

LIEN.

1. A printer employed to print certain numbers, but not all consecutive numbers, of an entire work, has a lien upon the copies not delivered for his general balance due for printing the whole of those numbers. *Blake and Others, Assignees of Stratford, a Bankrupt, v. Nicholson*, M. 55 G. 3. 167
2. Where by charter-party the ship-owners covenanted to receive a full cargo, and the freighter to load the same, and to pay so much for every ton of ~~flax~~ ^{flax} which should be delivered at the king's beams at L., and so much per ton for demurrage, and the parties mutually bound themselves, espe-

cially the ship-owners, the ship, her tackle, and appurtenances, and the freighter, the goods to be laden and put on board, in a penal sum, for the performance of every article contained in the charter-party: Held that the ship-owners had not a lien upon the goods actually brought home to L. for a sum of money claimed to be due in respect of goods which were put on board at the loading port, but afterwards relanded, and restored to the agent of the freighter, under process of the law at the loading port, nor for a sum claimed for dead freight, nor for a sum claimed for demurrage. *Birley, Assignee of Holt, Bankrupt, v. Gladstone and Another*, M. 55 G. 3. Page 205

LIMITATION OF ACTION.

Where a canal company were empowered to supply the canal with water from all streams whatsoever within the distance of 2000 yards, except as thereafter mentioned with a proviso that nothing should extend to authorize them to take water from certain specified streams between 10th June and 10th September, except only that if one of those streams should overflow, the same may be taken into the canal so long as such overflowing shall continue; and that all actions should be brought for any thing to be done in pursuance of the act, or in the execution of the powers and authorities before given, within six calendar months after the fact committed; or in case of continuation of damages, within three calendar months after the committing such damages shall have ceased: Held that the taking and continuing to take the water by the company from the specified streams during the prohibited

times, might, nevertheless, be so far a thing done in execution of the powers and authorities given them by the act as to entitle the company to the protection of the act as to the time of commencing the action against them. And therefore an award which found that they did take the water from two of the specified streams, &c. during the prohibited times, and when the other stream did not overflow, and consequently that it was not done in pursuance of the act, or in the execution of its powers and authorities, and therefore not within the protection of the act as to the time of commencing the action, was ill. *Gallop v. Wilts Canal*, H. 55 G. 3. Page 380

MANDAMUS.

See AFFIDAVIT, 4. CONVICTION.

By charter 7 H. 3. the mayor of Liverpool is appointed to be elected out of the 41 common councilmen, and every mayor is appointed an alderman; and it is granted "quod quodocunque acciderit aliquem majorem, &c. aut aliquem vel aliquos de ballivis, vel de comuni concilio vill. præd. pro tempore existent. obire, seu ab officio suo, vel ab officiis suis, amoveri, vel decedere, sive stare recusare, quod tunc, & in quolibet tali casu, al' idonea persona, vel al' idoneæ personæ, de tempore in tempus, ad & in offic' illius, vel ad & in offic' illorum sic amot', vel obeunt', sive stare recusant', eligetur," &c.; and by subsequent charters every alderman is appointed a justice for the town: Held that the defendant, who was a common councilman, and had once served the office of mayor, and acted as justice for the town, but had since quitted the town, and resided four

614 MONEY HAD AND RECEIVED.

miles distant, having only a bank there, and was an acting magistrate for the county, was not entitled to refuse to stand at a subsequent election of mayor, though the serving that office would compel him to remove his residence to the town, and prevent his acting as magistrate for the county; and therefore the Court granted a mandamus to take upon himself the office, he having been elected at such subsequent meeting. *The King v. Leyland*, M. 55 G. 3. Page 184

MARRIAGE,

See AGREEMENT. SETTLEMENT BY MARRIAGE.—And notes at end of case *The King v. The Inhabitants of Billingshurst*, M. 55 G. 3, 259 —267

MISNOMER,

See AMENDMENT.

MONEY HAD AND RECEIVED.

Where defendant received from his principal abroad a bar of silver, and took it to plaintiffs, who melted it, and sent a piece to an assayer to be assayed at defendant's expence, and paid a price for the bar to defendant, as for the number of ounces of silver which by the assay it was calculated to contain, which number was afterwards discovered to exceed the true number: Held that plaintiffs might, after having offered to return the bar, have money had and received against defendant for the price thus paid to him under a mistake, although defendant had forwarded his account to his principal, and in it had placed the price received to the credit of his principal. *Cox and Others v. Prentice*, H. 55 G. 3. 344

MORTMAIN,

See CHARITABLE USES.

PLEADING.

NEW TRIAL.

1. The presence of all the defendants convicted of an indictment for a conspiracy is necessary in order to move for a new trial on behalf of any of them. *The King v. Askew and Others*, T. 54 G. 3. Page 9
2. S. P. *The King v. Ld. Cochrane*. 10. n.

NOTICE,

See BILLS OF EXCHANGE, 3. *VARIANCE*, 2.

A term's notice is not necessary where there have been no proceedings for four terms after verdict. *May v. Wooding*, H. 55 G. 3. 500

ORDER IN COUNCIL,

See SOUTH SEA COMPANY.

OVERSEERS,

See COSTS, 2.

PARTICULARS, BILL OF,

See DEBT.

PEER.

If a peer be sued jointly with others by bill of *Middlesex*, the Court will set aside the proceedings as against the peer. *Briscoe, Bart. v. The Earl of Egremont and Others*, T. 54 G. 3. 88

PENAL ACTION,

See VENUE.

PIRACY,

See COPYRIGHT.

PLEADING,

See INDICTMENT. VARIANCE. VENUE.

1. Where upon the execution of an annuity bond by three out of several obligors, the grantee of the annuity paid the consideration-money to

to *D. S.*, one of the three, who immediately paid it into a banker's in the names of himself and *J. L.*, the attorney who acted for all parties, and took the banker's receipt for the money in the names of himself and *J. L.*, which was done in consequence of the other obligors not attending to execute the bond, it being agreed by the parties then present that until the securities should be executed the money should remain in the hands of a banker, and afterwards, upon the execution of the securities, the money was paid at the banker's with the authority of *J. L.* to *D. S.*, and upon debt brought by the executors of the grantee on the annuity bond, the condition of which, on oyer, stated that the grantee paid the money to the obligors, and the memorial stated that the money was paid to *D. S.*, to the use of himself and the other obligors by the grantee: Held that a plea alleging that in the assurances the consideration-money was stated to be paid by the grantee, and that it was not stated in the assurances that the sum was advanced by any agent or agents of the grantee, and that the same was advanced on behalf of the grantee by *J. L.* and *D. S.*, was to be taken as pleaded with reference to the annuity act, 17 G. 3. c. 26., and that it raised an objection which was sustained by the facts, and invalidated the bond. *Horwood and Another, Executors of W. Coars, deceased, v. Underhill, T. 54 G. 3.* Page 82

2. In a declaration for slander of plaintiff in his trade, a count alleging that the defendant, in a certain discourse in the presence and hearing of divers subjects, falsely and maliciously charged, and asserted, and accused plaintiff of being in insolvent circumstances, and stating special damage, but without setting out the words, is ill, and if it be

joined with other counts, which set out the words, and a general verdict given, the Court will arrest the judgment. *Cook v. Cox, T. 54 G. 3.* Page 110

3. To debt on an award made by arbitrators upon a submission to them generally without any time, a plea that the arbitrators did not make any award within a reasonable time, adjudged ill. *Curtis v. Potts, T. 54 G. 3.* 145
4. In a declaration on a promissory note, with the common counts, it is enough to allege a county for a venue, without a parish. *Ware v. Boydell, T. 54 G. 3.* 148
5. Declaration against the maker of a promissory note, payable at a particular place, and avers a presentment at the place, and that the defendant, licet sepius requisitus, hath hitherto refused, and still doth refuse to pay. Held well upon demurrer, and that a refusal at the particular place need not be averred. *Butterworth v. Lord Le Despencer, T. 54 G. 3.* 150
6. The plaintiff cannot sign judgment after plea in abatement, because the affidavit to verify the plea was sworn before the defendant's attorney. *Horsfall v. Mattheuman, T. 54 G. 3.* 154
7. A declaration by *P.* and *C.* assignees of a replevin-bond, stating that they distrained the defendant's goods for rent due to *P.*, is good, without naming *C.* bailiff. Both avowant and person making cognizance may take an assignment of the replevin-bond, and sue jointly upon it. The declaration need not set out the goods distrained: and if it state that the sheriff took the bond in double the value, conditioned for prosecuting, &c. and for making return of the goods in the condition mentioned, and thereupon the sheriff replevied the same, that shews that the bond was conditioned for a return of the goods distrained.

And the declaration is not double, because it alleges that the defendant did not prosecute his suit with effect, and hath not made a return. *Phillips and Another v. Price, M. 55 G. 3.* Page 180

8. A bill of exchange in this form: "Pay to T.G.B. or order 315*l.* value received," and subscribed by the drawer, may be alleged in pleading to be a bill of exchange for value received *by the drawer. Grant v. Da Costa, H. 55 G. 3.* 351

9. Debt on bond with a penalty; plea infancy; replication, that after the making of the bond and before commencement of the suit he attained his full age, and afterwards, and before the suit, assented to and ratified and confirmed the bond: Upon special demurrer, held that the replication was ill, for an infant cannot give a bond with a penalty for the payment of interest; and unless he be estopped by some act at full age of as high authority as the bond, he shall avoid it. *Baylis v. Mary and John Dineley, H. 55 G. 3.* 477

10. Debt on bond made by C. and his sureties, with a condition reciting stat. 27 G. 2. c. 38., and that C. (four years before the date of bond) was appointed by the churchwardens and parishioners of D., in pursuance of the statute, collector of the poor-rates to be levied and raised in the parish, and conditioned that C. should account, as often as required, for all monies so collected and received by him, by virtue of the act, &c. Breach, for not accounting for monies collected and received since the making of the bond. Plea, that C. accounted for all the monies collected and received by him before the making of the bond; 2dly, that the office of collector is an annual office, and that C. accounted for all the monies collected and received by him

within the current year of office in which the bond was made: Upon demurrer, held that both pleas were ill, for by the words of the statute the appointment is prospective, to collect future rates, and not retrospective only, and the condition is in the words of the statute, without any restraining words; and it is not pleaded that the office was an annual office at the time of making the bond, and if it had been, yet it appears by the statute not to be an annual office, though concerning rates which are raised in the course of a year. *Curling and Others v. Chalklen and Others, H. 55 G. 3.* P. 502

PLEDGES,

See BAIL, 2.

POST-HORSE DUTY.

See LICENCE.

The letting to hire a hearse and four horses, by a person licensed to let horses, for the purpose of conveying a corpse from Y. to B. to be buried, for which the person letting charged and received a specific sum for the job, and not after the usual or any certain rate per mile, was holden not to be liable to the post-horse duty. *Smith and Another, q. t. &c. v. Moss, T. 54 G. 3.* 15

POWER,

See DEVISE, 2.

1. Devise to the use of H. I. for life without impeachment of waste, &c. remainder to the use of plaintiff for life, with power to make leases for two or three lives, &c. or for the term of 21 years, so as there be reserved the best rent without taking any sum or sums of money, or other things, for or in lieu of a fine; and H. I. by indenture

15 October leased for 14 years, to be computed as to the meadow land from 13th February last, the pasture from 25th March last, and the messuage from 12th May last, under a yearly rent, payable to lessor, and such other person as should be entitled to the freehold and inheritance, half yearly, on 11th November and 25th March, the first payment to be made on 11th November next ensuing, and lessee covenanted with lessor, his heirs, and assigns, for payment to lessor and such other person, &c. of the rent at the days and times, &c. Held that the lease for 14 years was warranted by the power to lease for 21; and that the reservation of the first half year's rent, payable at the end of 27 days, was not taking a sum of money for a fine, being in consideration of a preceding occupation; and that plaintiff, after the death of *H. I.*, was an assignee within stat. 32 *H. 8. c. 34.*, and might maintain covenant against the lessee for rent-arrear after the death of *H. I.*, and during the continuance of the term. *Isherwood v. Oldknow*, *H. 55 G. 3.*

Page 382

2. Devise of lands to *E. B.* for life, with power to charge the same, by any deed or deeds, writing or writings, under her hand and seal, attested by two or more witnesses, or by will, &c. and for securing the raising and payment of the charge to limit and appoint the devised premises to trustees, &c.: Held that the power was not well executed by deed charging the premises with a sum of money, and for securing the same devising them for a term; such deed being signed, sealed, and delivered in the presence of two witnesses, but the attestation indorsed on the deed and subscribed by the two witnesses, expressing only that it was

sealed and delivered in their presence. *Wright and Others v. Barlow and Others*, *H. 55 G. 3. P. 512*

PRACTICE,

See ABATEMENT. AFFIDAVIT 4. BAIL. BARON AND FEME. BILL OF EXCHANGE, 2. COSTS. INQUIRY, WRIT OF. PLEA.

1. If a cause be removed by defendant by habeas corpus, out of an inferior court, plaintiff is not bound to declare in the court above if he has taken no other steps than compelling the defendant to pay in and justify bail there. *Cleat v. Dixon*, *T. 54 G. 3.* 23
2. The plaintiff may obtain a rule for referring a bill of exchange to the master on the day on which interlocutory judgment for want of a plea is argued. *Pocock v. Carpenter*, *T. 54 G. 3.* 109
3. The Court held that plaintiff might lodge a detainer against defendant in custody upon mesne process, after his bail had justified, the defendant not having completed his discharge, but being still within the prison: and that he was not entitled to his discharge upon an affidavit that the sum for which the detainer was lodged was due at the time of the first arrest. *Quin v. Reynolds*, *T. 54 G. 3.* 144
4. An affidavit of debt not intitled of any court, and only with the words *by the court written* at the bottom of the jurat, is not sufficient. *Molling v. Polans*, *T. 54 G. 3.* 157
5. In an affidavit to hold to bail, if the deponent be described as "of the city of London, merchant," it is sufficient. *Vainlor v. Alderson*, *M. 55 G. 3.* 165
6. Affidavit to hold to bail "that *R. Sutton* is indebted to plaintiff for money paid and laid out to the use of the said *R. Jackson*," held well

wellenough. *Hughes v. Sutton, M. 55 G. 3.* Page 178

7. The Court will not grant a rule that the plaintiff may give security for costs, unless application has been made to him to give security.

Bass v. Clive, M. 55 G. 3. 283

8. The Court, upon application to set aside a regular attachment against the sheriff for not bringing in the body, will require either an affidavit of merits, or that the application is made on behalf of the sheriff, or the bail, without collusion with or indemnity from the defendant. *The King v. The Sheriff of Middlesex, in a case of Gee v. White, M. 55 G. 3.* 299

9. A term's notice is not necessary where there have been no proceedings for four terms after verdict.

May v. Wooding, H. 55 G. 3. 500

10. Proceedings in replevin stayed after consuance and plea in bar, upon payment of costs of the action and distress, and replevying, and delivering up the replevin bond to be cancelled, there being no special damage. *Banks v. Brand and Another, H. 55 G. 3.* 525

PRISONER,

See Costs, 3.

PRIVILEGE,

See CONSUL. PEER.

PROMOTION, Page 336.

REGULA GENERALIS.

Seal Office, *T. 54 G. 163.* 163

RELEASE.

A deed *inter partes* cannot operate as a release to strangers: therefore a charter-party between *A.* and *B.*, in consideration of a former charter-party between *A.* and *C.*, which for-

SETTLEMENT.

mer charter-party, in consideration of the freight *B.* was to pay, was thereby declared null and void, *A.* agreeing to cancel the first in consideration of the second, and *C.* was thereby acquitted of all claims which *A.* might have against him in virtue of the first charter-party, was held not to operate as a release from *A.* to *C.* of the first charter-party. *Storer v. Gordon and Others, M. 55 G. 3.* Page 308

RENT,

See DEBT.

REPLEVIN,

See INQUIRY, WRIT OF. PLEADING, 7. PRACTICE, 10.

SALE,

See FRAUDS, STATUTE OF.

Where the seller of goods upon the buyer's refusal to accept them requested the buyer to sell them for him, which the buyer agreed to do if he could, but did not: Held that in an action by the seller for the price, the jury, in considering whether the request made by the seller was a waiver of the contract of sale, could not take into their consideration whether such request was made under an ignorance of the law, and impression that his remedy was gone. *Gomery v. Bond, H. 55 G. 3.* 378

SETTLEMENT—by Estate.

Grandfather, father, and son, and the grandfather gave the father a piece of land, on which he immediately built a house, and continued in possession for 30 years, without paying any rent or acknowledgment, sometimes residing in the house with his family, and at other times letting it, and receiving the rent:

rent: Held that the son, who ceased to be a part of his father's family 15 years after the building of the house, was entitled to the settlement which the father gained by residing in the house. *The King v. The Inhabitants of Calow*, T. 54 G. 3.

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SETTLEMENT—by Hiring and Service.

1. Where the master of a servant under a yearly hiring, 28 days before the end of the year, gave up his business, sold his stock, and paid off and discharged the servant, with all his other servants, paying them their full wages, and telling them to go where they liked, and the servant took his wages, left the house, and worked with another person, with the master's knowledge, during the 28 days: Held that this was a dissolution of the contract; and it appearing upon the case stated by the sessions that they had proceeded on the ground of its being a dispensation, though the sessions did not find that as a fact, this Court quashed the order of sessions. *The King v. The Inhabitants of Bray*, T. 54 G. 3. 20
2. An invalided soldier at the depot, who, in pursuance of an order from government, had leave of absence upon agreeing to relinquish his pay for the time, which leave was renewed from time to time, by furlough, for different periods of three, six, and four months, which he procured by going to the depot for them, was held not to gain a settlement by hiring and service for a year, not being *sui juris* lawfully to hire himself within the stat. 3 W. & M. c. 11., though before such hiring the mistress applied to the commanding officer at the depot, to know if he might hire him-

self for a year, and was told that he might, and during the year's service he received no pay, nor was called upon, nor did perform any military duty. *The King v. The Inhabitants of Beaulieu*, M. 55 G. 3.

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3. A servant in husbandry, hired to serve for the weekly wages of 4s., board, washing, and lodging, except in the harvest month, when his wages were to be increased to 10s. 6d. per week, and then again reduced to 4s., does not gain a settlement; for that is only a weekly hiring. *The King v. The Inhabitants of Dodderhill, in Wych, otherwise Droitwich*, M. 55 G. 3. 243
4. Where an infant bound himself apprentice for seven years by indenture, to which indenture he and his master were the only parties, and after serving some time, in consequence of the master's running away and leaving him, procured the indenture to be given up to him with the master's consent, and afterwards, during the seven years, hired himself as a yearly servant and served a year: Held that he acquired a settlement by such hiring and service, for it was for the infant's benefit under the circumstances that he and his master should be at liberty to put an end to the indenture. *The King v. The Inhabitants of Mountsorrel*, H. 55 G. 3. 497

SETTLEMENT—by Marriage.

1. A person whose baptismal and surname was A. L., was married by banns by the name of G. S., having been known, in the parish where he resided and was married, by that name only, from his first coming into the parish till his marriage, which was about three years: Held that the marriage was valid, and

and therefore the wife and children entitled to the husband's settlement. *The King v. The Inhabitants of Billingshurst*, M. 55 G. 3.

Page 250

2. A marriage by licence, not in the man's real name, but in the name which he had assumed because he had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was held a valid marriage. *The King v. The Inhabitants of Burton-upon-Trent*, H. 55 G. 3. 537

SETTLEMENT — by a Tenement of 10l. a Year.

1. Where five persons, as members of a managing committee of a corporation, who were proprietors of a bridge and the tolls thereof, demised the toll-house and tolls to the pauper, for one year, reserving a rent to the corporation, and a power of re-entry, but the demise was not under the corporation seal, but only under the seals of the five individual members: Held that the pauper did not gain a settlement by occupying the toll-house and tolls above 40 days, and that his having paid rent for the same made no difference, the annual value of the toll-house without the tolls not exceeding 5l. *The King v. The Inhabitants of North Duffield*, M. 55 G. 3. 247
2. Where the pauper was hired as bailiff to R., who held a farm, under an agreement that he was to have weekly wages, &c. and his master to find him a house, and either to furnish him with two cows, or the pauper was to be at liberty to hire two, and feed them on the farm, and he served three years under the agreement, and lived with his family in his master's house, occupying the kitchen and

two rooms, and hired two cows, which fed during the summer in the pastures of his master: Held that by the feeding of the cows which was above the yearly value of 10l., the pauper acquired a settlement. *The King v. The Inhabitants of Minster*, M. 55 G. 3.

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SEWERS, COMMISSIONERS OF.

The commissioners of sewers cannot assess a person in respect of drains which communicate with other drains that fall into the great sewer, if the level of his drains is so much above the sewer, that the stopping of the sewer could not possibly throw back the water so as to injure his premises, and if he be not, and it does not appear that he is likely to be, benefited by the works done upon the sewer. *Masters v. Scroggs*, H. 55 G. 3. 447

SHERIFF,

See BAIL, 1. EVIDENCE, 2. PRACTICE, 8.

SLANDER,

See PLEADING, 2. VARIANCE, 4.

SOLDIER,

See SETTLEMENT—by Hiring and Service, 2.

SOUTH-SEA COMPANY.

The stat. 47 G. 3. sess. 1. c. 23. which repeals so much of the stat. of Anne as vests in the South Sea Company the exclusive privilege of trading to parts within certain limits, extends only to such places within those limits as were at the time of passing the act, or at any time since, in the possession or under the dominion of his Majesty; and therefore an action was held not

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not to lie against the defendant for not safely stowing and conveying goods of the plaintiff from *London* to *Buenos Ayres*, which place was captured by his Majesty's forces, but afterwards recaptured before the passing of the act, and the shipment of the goods: although the goods were shipped under the sanction of an order in council purporting to authorize the voyage, and the re-capture was unknown when the goods were shipped and the voyage commenced. *Wilkinson, Assignee of Haffenden and Newcomb, Bankrupts, v. Loudon-sack, T. 54 G. 3.* Page 117

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Hen. V.

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ment. 371
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James I.

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pany.* 123
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PRACTICE, 9.

TOLLS,

See SETTLEMENT—by Tenement of
10l. a-year, 1.

VARIANCE,

See PLEADING, 8.

1. An allegation that an action was depending in his Majesty's Court of the Bench at Westminster, is not sustained by proof of a pluries bill of Middlesex; for by such allegation the common bench must be intended. *Impey v. Taylor, M. 55 G. 3.* Page 166
2. Where plaintiff declared that in a certain messuage or dwelling-house and premises, &c. he distrained for the rent of the said premises, with the appurtenants, by virtue of a certain demise thereof; proof of a lease of two messuages, reserving a rent, and of a notice of distress for the rent of the two messuages, was held not to be a variance. *Taylor v. Brooke, M. 55 G. 3.* 169
3. Where plaintiff declared that defendants accounted with him for all the monies severally due from them, and that the amount of such monies was 21l. 6s., and in consideration that he would forbear payment of the monies severally due from them, the gross amount of which was 21l. 6s., defendants undertook to pay the said sum, &c. and the plaintiff proved that the sum due to him was 20l. 18s.: Held that this was a fatal variance. *Arnfield v. Bate and Others, M. 55 G. 3.* 173
4. In slander, the declaration alleged that the plaintiff at the time of speaking, &c. was of two trades, and that defendant, intending to injure him in his several trades as

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aforesaid, and to prevent persons from employing him in the way of his said several trades, in a certain discourse which he had of and concerning the plaintiff in one of his trades, spoke, &c.: Held that though the plaintiff failed to prove he was of both trades, yet he might recover upon proof that he was of that trade concerning which the defendant was charged to have spoken the words. *Figgins v. Cogswell, H. 55 G. 3.* Page 369

VENUE,

See DEBT. PLEADING, 4.

In debt upon stat. 52 G. 3. c. 39., (pilot act,) for penalties for continuing in the charge of vessels without being licensed, the venue must be laid in the county where the offence is committed. *Barber q. t. v. Tilson, H. 55 G. 3.* 429

UMPIRAGE,

See AWARD.

VOYAGE, ILLEGAL,

See SOUTH SEA COMPANY.

WAIVER,

See ASSUMPSIT, 1. SALE.

WAR,

See INDICTMENT, 3.

WARRANT,

See COMMITMENT.

WARRANTY,

See INSURANCE, 2, 3.

WAY,

See APPEAL, 2.

WITNESS.

1. A Justice of the peace may commit a feme covert who is a material witness,

WITNESS.

witness, upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennet and Wife v. Watson and Another*, T. 54 G. 3.

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2. The commissioners of appeals in matters of excise, cannot reject the testimony of witnesses tendered for the appellant, upon appeal to

WRIT OF INQUIRY. 623

them against a conviction by the commissioners of excise, upon the ground that such witnesses were not examined at the original hearing. *The King v. The Commissioners of Appeals in Matters of Excise*, T. 54 G. 3. Page 133

WRIT OF INQUIRY,
See INQUIRY, WRIT OF.

END OF THE THIRD VOLUME.





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